

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 325.

**THE AMERICAN NATIONAL BANK OF NASHVILLE,
TENNESSEE, PLAINTIFF IN ERROR,**

vs.

**A. L. MILLER, AGENT OF THE FIRST NATIONAL BANK
OF MACON, GEORGIA.**

**IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SIXTH CIRCUIT.**

FILED JUNE 12, 1911.

(22,732)



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No. 2060.

**United States Circuit
Court of Appeals,
Sixth Circuit.**

AMERICAN NATIONAL BANK OF NASHVILLE, TENN.

Plaintiff in Error.

vs.

A. L. MILLER, AGENT,

Defendant in Error.

**Error to the Circuit Court of the United States for the
Middle District of Tennessee.**

RECORD.

ORIGINAL TRANSCRIPT FILED APRIL 19, 1910.



TRANSCRIPT OF RECORD.

At a regular term of the Circuit Court of the United States for the Middle District of Tennessee, begun and holden at the custom house, at Nashville, Tennessee, upon the third Monday of April, 1907, present and presiding the Hon. C. D. Clark, judge, etc., and successive judges thereafter, at subsequent terms, the following proceedings were had, to-wit:

Upon the 8th day of March, 1910, a bill of exceptions was filed as follows, to-wit:

A. L. Miller, Agent,

vs.

} No. 3494. Law.

American National Bank.

Upon the trial of the above entitled cause the following testimony was introduced and the following proceedings had:

After the jury was sworn, the declaration read, and the pleas read, defendants moved for leave to file the amendment to their pleading, which had been previously authorized by the court, but which, as defendants alleged, had not been made because of mere oversight. The amendment was allowed to be made, with leave to the plaintiff to apply for a continuance on account of such amendment. The plaintiff elected to take issue on the plea as amended and go to trial. Defendant thereupon read said third or amended plea (Sten. Rep. pp. 1 & 2).

Plaintiff then offered in evidence and read to the jury an agreed statement of facts, which is as follows:

A. L. Miller, Agent,

vs.

} No. 3494. Law.

American National Bank.

Stipulation of Agreed Facts.

It is hereby stipulated between the plaintiff, by his attorney and the defendant, by its attorney, that the following facts are true and may be read as evidence for either party on the hearing of this cause as the same were duly and legally approved, subject, however, to exception for competency and relevancy.

The right is hereby expressly reserved to each party to take the testimony of such witnesses in this cause as either party may deem advisable.

I. That A. L. Miller, the plaintiff in this cause, is agent for the First National Bank of Macon, Georgia, which bank is a banking corporation duly formed, chartered, organized and existing under and by virtue of the laws of the United States; and is a citizen of the state of Georgia and of the United States of America.

II. That the American National Bank of Nashville, Tennessee, the defendant, is a banking corporation, duly formed, chartered, organized and existing under and by virtue of the laws of the United States, and is a citizen of the state of Tennessee and of the United States of America, and is an inhabitant of the Middle District of Tennessee; and that as such corporation it has a right to do a general banking business.

III. That on May 14, 1904, and for some time prior thereto, the First National Bank of Macon, Georgia, and R. H. Plant, also of Macon, Georgia, were, respectively, depositors in and kept running accounts with the defendant, the American National Bank of Nashville, Tennessee, and that said R. H. Plant, on the 14th day of May, 1904, had to his individual name and credit, in the American National Bank of Nashville, Tennessee, more than three thousand (\$3,000.00) dollars.

IV. That on May 14, 1904, R. H. Plant was justly indebted to the First National Bank of Macon, Georgia, in the sum of three thousand (\$3,000.00) dollars.

That on said 14 day of May, 1904, R. H. Plant drew his check on the defendant, in the said American National Bank of Nashville, Tennessee, made payable to and in favor of the First National Bank of Macon, Georgia, in the sum of \$3,000.00 and delivered said check to said First National Bank of Macon, Georgia, in payment of the aforesaid indebtedness.

V. That said check so delivered to the First National Bank of Macon, Georgia, was by said First National Bank of Macon, Georgia, endorsed and forwarded together with instructions, through the United States mails, on that date to the American National Bank, the defendant, to place the same to the credit of the First National Bank of Macon, Georgia, on the books of the defendant, the American National Bank of Nashville, Tennessee.

VI. That the American National Bank, the defendant, received said check on Monday, May 16, 1904, and, in accordance with the instructions sent it by the First National Bank of Macon, placed the amount of said check on its books to the credit of the First National Bank of Macon, Georgia, and charged the amount of said check on its books to the credit of said First National Bank of Macon,

Georgia, and charged the amount thereof against R. H. Plant, the drawer of said check, and on said date, viz., May 16, 1904, duly notified the First National Bank of Macon, Georgia, through the United States mails, to that effect. That on May 16, 1904, a petition in bankruptcy was filed against R. H. Plant, at 11:45 o'clock a. m.

VII. That on May 16, 1904, said First National Bank of Macon, Georgia, was insolvent; that on the same date Walter F. Albertson was duly appointed receiver of said bank by the Comptroller of the Currency, under the provisions of Section 5234 of the Revised Statutes of the United States and Section 1 of the Act of Congress of June 30, 1876, chapter 156; that on July 20, 1904, said Albertson resigned as such receiver and W. J. Butler was duly appointed by the comptroller of the currency to succeed said Albertson as receiver; that on or about July 1, 1906, B. M. Davis was duly elected and qualified as agent of said bank under and by virtue of Section III of the Act of Congress of June 30, 1876, chapter 156, to succeed W. J. Butler as receiver of said First National Bank of Macon, and to continue the winding up of the affairs of said bank; and that on or about July 9, 1906, the plaintiff, A. L. Miller, was duly elected and qualified as agent of the First National Bank of Macon, under and by virtue of Section III of the Act of Congress of June 30, 1876, chapter 156, to succeed said Davis as agent aforesaid and to continue the winding up of the affairs of said bank.

VIII. That under and by virtue of the his selection and qualification, as agent of the First National Bank of Macon, the plaintiff, A. L. Miller, became vested with the title to and entitled to the possession of all of said insolvent bank's property and effects, and empowered to bring suit for the purpose of obtaining the same and collecting and receipting for the amount of said check.

IX. That said R. H. Plant, prior to May 14, 1904, and May 16, 1904, drew certain time drafts, payable to his own order, and aggregating fifty thousand (\$50,000.00) dollars, which drafts were drawn upon and accepted by R. H. Plant doing a banking business under the name of I. C. Plant Son's Bank of Macon, Georgia, and were afterwards endorsed by the said R. H. Plant, for value, to the defendant, the American National Bank of Nashville, Tennessee.

None of said drafts were due on May 16, 1904, nor did they become due for some time after May 16, 1904.

X. That the plaintiff, A. L. Miller, and his predecessors have made due demand upon the defendant, the American National Bank of Nashville, for the payment of the sum of three thousand (\$3,000.00) dollars, the amount of said

check drawn by R. H. Plant in favor of the First National Bank of Macon, Georgia, which check was received by the defendant, the American National Bank, and by it duly credited on the 6th day of May, 1904, to the credit of the First National Bank of Macon, Georgia; but said defendant, the American National Bank of Nashville, failed and refused and still fails and refuses to pay said sum or any part thereof to plaintiff.

The foregoing stipulation is agreed to by the attorneys for the plaintiff and the attorney for the defendant with the understanding that the same be sent to Messrs. M. P. Callaway and A. L. Miller, at Macon, Georgia; that the facts necessary to fill in the blanks left in said stipulation be ascertained by them and the blanks filled accordingly; and that their compliance with this understanding be noted hereon.

Executed in duplicate, this 6th day of Mch., 1908.

Baxters,

Attorneys for Plaintiffs.

John M. Gaut,

Attorney for Defendant.

The blanks in the foregoing stipulation filled in by the undersigned this 17th day of March, 1908.

A. L. Miller,

M. P. Callaway.

Endorsed: Filed April 6, 1908. H. M. Doak, Clerk.

Complainant here rested his case.

Defendant then read in evidence the deposition of L. T. Stallings, which is as follows, viz:

A. L. Miller, Agent for the Shareholders of the First National Bank of Macon, Georgia,

vs.

American National Bank of Nashville, Tennessee,

No. 3494. Law.

United States of America, Southern District of Georgia,
State of Georgia, County of Bibb, ss.:

The examination of witnesses de bene esse beginning on the 25th day of June, 1908, on behalf of the defendant, before me, Charles Cork, notary public of said county, at the office of A. L. Miller, in the Fourth National Bank Building, in Macon, Bibb county, Georgia, in a certain suit now pending in the Circuit Court of the United States for the Middle District of Tennessee, in the district aforesaid, wherein A. L. Miller, agent for the shareholders of the First National Bank of Macon, Georgia, is plaintiff and the American National Bank of Nashville, Tennessee, is defendant, L. T. Stallings, a witness produced on behalf

L. T. Stallings.

of the defendant, being first duly sworn, deposes and says as follows:

Direct examination by Mr. M. P. Callaway:

1. State your residence and place of business at the present time?

A. Macon, Georgia; I am with the American National Bank.

Q. 2. Your age?

A. Age is 48.

Q. 3. From January 1, 1904, until May 16, 1904, what was your business and where were you employed?

A. I was employed as the general bookkeeper in the First National Bank of Macon, Georgia.

Q. 4. How long had you been in that employment?

A. Of the bank, or that particular position?

Q. 5. Of this particular bank?

A. I had been there about 16 years.

Q. 6. Mr. R. H. Plant was president of the First National Bank?

A. Yes, sir.

Q. 7. The private bank of I. C. Plant's Son, where was it situated, located?

A. It was right next door to the First National Bank, on the Cherry street side—we were on the corner of 2nd and Cherry.

Q. 8. Was there any physical connection between them—any entrance between these two banks?

A. Yes, sir; each had access to the other.

Q. 9. Doors opened between?

A. Yes, sir.

Q. 10. The private bank of I. C. Plant's Son, that was just R. H. Plant individually, was it not?

A. Yes, sir.

Q. 11. He did business under the firm name and style of I. C. Plant's Son?

A. Yes, sir.

(A. 12. Testimony within brackets—Q. 6 to Q. 11, inclusive) is objected to as irrelevant, immaterial and incompetent. Sloss D. Baxter, Attorney).

Q. 12. The First National Bank closed its doors, I believe, on the morning of the 16th of May, 1904, was it not?

A. Yes, sir.

Q. 13. At what time that day—about what time, do you recall?

A. Why, it was something like twenty minutes past nine, about that time, is my recollection.

L. T. Stallings.

Q. 14. Was the bank open for regular business on that morning?

A. Yes, sir.

Q. 15. And the private bank of I. C. Plant's Son suspended payment just previously?

A. I don't think the private bank opened that morning. I think the curtains were closed about nine o'clock.

Q. 16. The private bank of I. C. Plant's Son did not open for regular business that morning?

A. That was my impression that it did not.

Q. 17. Mr. Stallings, in the conduct of the business of the First National Bank, was the business run by a finance or executive committee, or was it operated by Mr. Plant himself for the most part? In other words, who was the managing head and director of that bank?

A. Mr. R. H. Plant.

Q. 18. Did any committee of the directors look after the discounts and pass upon the paper taken in day by day, or was that done under the direction of Mr. Plant?

A. Why, it was done under the direction of Mr. Plant.

Q. 19. He controlled the financial policy of the First National Bank?

A. As far as I was able to observe he did.

Q. 20. Do you know, or not, whether he controlled the majority stock of the First National Bank?

A. I cannot answer that, because I don't know.

Q. 21. Do you know the capital stock of the bank?

A. The capital stock was \$200,000; I am going from memory now, but I think that is right.

Q. 22. In connection with matters of Mr. Plant's own private business in relation to the First National Bank, who directed that—in other words, the discounting of his own paper or on loans to Mr. Plant himself by the First National Bank, who controlled that feature of the business?

A. Whatever he presented was taken by the bank, so far as my observation went—I don't know what was behind.

Q. 23. You were familiar with the general workings of that bank from day to day, were you, you were there and saw what went on?

A. Yes, sir.

Q. 24. Such paper of Mr. Plant's own that he turned over to the bank for credit or discount was accepted?

A. Yes, sir.

Q. 25. Was that true whether it was endorsed by Mr. Plant or not, if he tendered paper that was not endorsed

L. T. Stallings.

by him would the First National Bank accept such paper?

A. It was customary to accept such paper, but with the custom that had existed for some years, that he was liable for it.

Q. 26. As a matter of fact his name did not appear?

A. Sometimes it did not.

Q. 27. Sometimes it did and sometimes it didn't, but he was liable to the bank on their private understanding?

A. Yes, sir.

Mr. A. L. Miller: Don't lead the witness, Mr. Callaway.

Q. 28. How was the clearing house, the bank clearing house, conducted during those months from the first of January, 1904, until the failure of the First National Bank?

A. In what special particular do you refer?

Q. 29. Who acted as clearing house agent?

A. The cashier of the First National Bank.

Q. 30. What were the functions of the clearing house?

A. Why, it was merely to adjust the balances between the different banks for that day's work, giving a check to the bank which had a credit balance on some of the banks which owed the clearing house or who had a debit balance which was adjusted each day on the clearing house.

Q. 31. All of the checks each bank held upon the other banks were adjusted through means of the clearing house?

A. Yes, sir.

Q. 32. Did you have anything to do with the particular working or settlement of those clearing house balances, from day to day?

A. Yes, sir; I either made the settlement or assisted in making them every day.

Q. 33. I hand you a sheet with the words "Plant's Son" at the head, and with a rubber stamp, March 15, 1904, appearing at the head, explain what that sheet is?

A. That is the settlement sheet that was sent to the clearing house by I. C. Plant's Son bank for this date.

Q. 34. Upon the column headed credit, those figures were put, the totals, before it came from Plant's Son's Bank?

A. Yes, sir; it came in with these entries here showing the amount they had on the different banks of the city.

Q. 35. That the private bank of I. C. Plant's Son had on the other banks?

A. Yes, sir; and it footed this on here.

L. T. Stallings.

Q. 36. Is it not true that day the private bank had credits of \$13,443.17 charged to the other banks in Macon?

A. Yes, sir.

Q. 37. What did the figures under the heading debit column mean?

A. These were listed after the sheets came into the clearing house, representing the amounts held by the other banks on the Plant bank?

Q. 38. Who entered those figures upon this particular sheet?

A. Those are my figures there.

Q. 39. The first figures under the column No. 1, First National, \$77,055.45, what did those figures represent?

A. It represented the amount of the checks that we had against the Plant bank for that day.

Q. 40. And the other figures on that column, they represent what?

A. The amounts that the other banks had on the Plant bank for that day.

Q. 41. The total, then, of the column of checks against Plant held by the other banks on that day was \$95,980.11?

A. Yes, sir.

Q. 42. Have you any memorandum on that sheet showing how the clearing house distributed that balance against Plant?

A. Why, usually, I had a very distinct memorandum. Here would indicate by this mark here that Number One held the balance.

Q. 43. It would indicate that you gave a check against the First National Bank—it would indicate that the First National Bank took a check against Plant for the entire debit balance that day?

A. It would indicate that by my figure there. I usually put it down so they would know on the other side who held the check.

Q. 44. Was it not your custom, when the First National Bank held the entire check to simply make the figure one as you see on that sheet?

A. Yes, sir.

Q. 45. To indicate that bank took the entire balance that day?

A. Yes, sir; unless the difference was insignificant, so it would not amount to anything.

Q. 46. I will ask the commissioner to identify that as exhibit 1. The next slip, a similar slip, to the one I have just shown you, dated March 28, 1904, state the amount of

L. T. Stallings.

the aggregate checks held against the private bank of I. C. Plant's Son that day by the clearing house?

A. \$143,082.02.

Q. 47. How much of that amount did the First National Bank take?

A. \$104,500. That is approximate, the odd dollars are not put down.

Q. 48. A similar sheet dated March 30, 1904. I will ask you to state the balance in the clearing house that day against the private bank of I. C. Plant's Son?

A. \$122,701.24.

Q. 49. And what amount of that sum was taken by the First National Bank?

A. \$111,000, the round amount.

Q. 50. I exhibit you a similar sheet dated April 14, 1904, will you state the aggregate balance against the private bank of I. C. Plant's Son on that date held by the clearing house?

A. \$131,682.95.

Q. 51. What does that balance mean?

A. It means that Plant's bank owed the clearing house or the different banks composing the clearing house, that amount.

Q. 52. \$131,682.95?

A. Yes, sir.

Q. 53. How did the clearing house dispose of that balance against Plant that day?

A. I cannot tell, there is no indication.

Q. 54. There is no memorandum of that?

A. None.

Q. 55. I hand you a similar sheet dated April 15, 1904, state whether or not the itemized list of the checks held by the First National Bank against the other banks is attached to that exhibit I just handed you?

A. Yes, sir; the amount is here.

Q. 56. Can you state from that itemized sheet the clearing house check that the First National Bank held on the 15th of April, against the private bank of I. C. Plant's Son?

A. I can state with reasonable certainty but not positively, as the items are not specified, but knowing the manner in which these were listed I can with reasonable accuracy tell what it was.

Mr. D. M. Jones: You would get that information from the books?

A. The amounts are listed here on this ticket. The amount is \$124,600.36.

L. T. Stallings.

Q. 57. Now state the clearing house balance against the bank of I. C. Plant's Son on April 15, 1904, the day on which that check appears to have been brought over?

A. \$119,252.02.

Q. 58. Can you state from that memorandum I show you how that was disposed of?

A. No; there is no indication on this.

Q. 59. Will you refer again to exhibit No. 4, clearing house sheet dated April 14, 1904, and see if you can find the itemized slip of the checks held by the First National Bank against Plant on that date?

A. Yes, sir.

Q. 60. Well, what was the amount of the checks held on the 14th, brought over from the previous time, held against the bank of I. C. Plant's Son?

A. Making the same statement about this as I did about the other one, it is, \$129,196.42.

Q. 61. Now examine these exhibits that you have identified, state whether or not in all of those exhibits upon the itemized statement of checks held by the First National Bank against the bank of I. C. Plant's Son, if they do not appear, those checks for varying but very large amounts at the head of the column of each one of those detailed settlements?

A. If they do not appear?

Q. 62. Yes, sir; if you do not find them—state whether or not they in fact do appear upon these sheets?

A. You want me to look at each one?

Q. 63. Yes, sir.

A. Yes, sir; all of them show a heavy balance carried forward from the day previous.

Q. 64. As being due by I. C. Plant's Son?

A. Yes, sir.

Q. 65. I exhibit you a similar sheet which the examiner will identify as exhibit No. 6, dated May 11, 1904, what was the aggregate balance against the private bank of I. C. Plant's Son on that day?

A. \$92,204.06.

Q. 66. That sheet shows how the balance was disposed of by the clearing house?

A. Yes, sir; No. 1, or the First National Bank, took \$91,100; No. 6 took \$150. No. 7 took \$900.

Q. 67. On the following day, May 12, 1904, on a similar sheet, state the balance against the private bank of I. C. Plant's Son on that day?

A. \$89,574.89.

Q. 68. How was that disposed of by the clearing house?

L. T. Stallings.

A. \$88,800 went to the First National and \$700 went to the American National.

Q. 69. I show you a similar sheet, dated May 13, 1904, state the amount of the balance against or in favor of Plant's Son on that date?

A. The balance was in favor of Plant's Bank for \$2,-455.61. The ticket is torn off, the cents do not appear.

Q. 70. On the day of the 13th, May 13, 1904, how much does the First National Bank's ticket against Plant indicate was brought over from the 12th as being due?

A. \$73,893.25.

Q. 71. What was the amount of the tickets or debits against the First National Bank held by I. C. Plant's Son and sent into the clearing house on that date?

A. \$110,279.73.

Q. 72. Those were for tickets or cash tickets that the First National had given I. C. Plant's Son?

A. Yes, sir; cash items either in checks or tickets.

Q. 73. And that cleared up or paid off, did it not, the debit balance that the First National Bank had been carrying against Mr. Plant previous to that time?

A. Yes, sir.

Q. 74. I show you a similar sheet dated May 14, 1904, state how the balance appeared that day against I. C. Plant's son?

A. They had a credit of \$6083.63.

Q. 75. State what that means, Mr. Stallings?

A. Why, it means that the amounts they sent in against the other banks was in excess of what other banks had against them that amount.

Q. 76. If I understand you then, you mean to say that on May 14, 1904, the balance as shown to be due on May 12, 1904, had been cleared off and paid?

A. Yes, sir.

Q. 77. State whether or not you remember or recall the settlement having taken place between the First National Bank and I. C. Plant's Son, of the clearing house balance that had been carried up to May 12, 1904?

A. Yes, sir; I remember it.

Q. 78. State what happened, if you remember about it?

A. Why, Mr. Plant, or some representative of the Plant Bank, came in there and presented items enough to pay up the balance that the First National Bank held against the Plant Bank and did pay it up.

Q. 79. Had those clearing house balances carried against I. C. Plant's Son borne interest?

A. Yes, sir.

L. T. Stallings.

Q. 80. Was interest paid to the First National Bank by Plant upon those balances?

A. Yes, sir.

Q. 81. At what rate?

A. Now, I do not recall the rate. My recollection is it was—why I think it was six per cent. I would not be positive about the rate, it was six or seven. On second thought, I think it was seven per cent, sir.

Q. 82. Will you examine the general ledger of the First National Bank and see if you find any memorandum of the three thousand dollar check on the American National Bank of Nashville having been turned over to the First National Bank by Mr. Plant about May the 11th or May 12th?

A. Here is the entry here on May 13th.

Q. 83. May 13, 1904?

A. 1904.

Q. 84. What did the First National Bank do with that check, do you know?

A. They accepted it as cash from Mr. Plant and sent it for their credit to the American National Bank at Nashville.

Q. 85. That three thousand dollars was a part, was it not, of the amount you testified to, that was turned over by Mr. Plant in settlement of his clearing house balance?

A. I think it was taken in part payment.

Q. 86. On the 11th or 12th, whatever date it was?

A. I can answer that more definitely by stating that these items were brought in by Mr. Plant from day to day and he either took debit tickets for them or a reduction of the clearing house check.

Q. 87. If he took a ticket from any member of the First National Bank for that, he merely put the ticket in as cash against the bank the next day, or that day, if he got it in time for the clearing house, would it not result in the same thing, a reduction of that clearing house balance whichever of those methods you just described was adopted?

A. Yes, sir; in either case the ticket was listed against the First National Bank. Here is the check in question (referring to entry on book) No. 1441, drawn by R. H. Plant on the American National Bank of Nashville, for \$3000. I don't know the date of the check, the date it was received was the 13th. (Referring to entries on cash book of the First National Bank.)

Q. 88. Do you know when that check was forwarded to Nashville for collection?

L. T. Stallings.

A. Why, yes, sir; following the usual custom, it was forwarded that day, unless for some reason it was held over—I cannot answer that definitely or positively.

Q. 89. Can you state from the cash book how much was the aggregate of checks turned over by Mr. Plant on that day?

A. I can, if you would give me time to pick them out. I would have to go through the book and pick them out one by one.

Q. 90. How were these clearing house balances against I. C. Plant's Son carried by the First National Bank, were they carried as a cash ticket?

A. As a cash ticket.

Q. 91. From day to day?

A. Yes, sir.

Q. 92. When was the bank examiner last, or when did the bank examiner last examine the First National Bank?

A. On Saturday, May 14.

Q. 93. Do you know whether he examined any other banks in Macon just previous to that time?

A. Why, yes, sir; my recollection is he examined another bank the day before, on Friday, May 13,—at least we were told so up there.

Q. 94. Do you remember what time the receiver appeared and took charge of the First National Bank?

A. Yes, sir; he was recalled from Forsyth on the day the bank closed its doors; he got back there, I don't remember the hour—something like the middle of the day, perhaps.

Q. 95. Mr. Stallings, do you recall at the hearing upon certain claims filed by the First National Bank, on account of the discount of the notes of Hodgson & Ketchum, producing from the files of the First National Bank the copies of the reports the bank made to the Comptroller of the Currency, I show you the sheet backed No. of bank, 1617, report of First National Bank, located at Macon, Georgia, March 28, 1904, and state whether that is the copy of the statement produced by you at that time?

A. I do not recall the exact circumstances of that being introduced before, but this is evidently a copy of the report filed by the First National Bank at the date named.

Q. 96. In whose handwriting is the copy of that report?

A. That looks like Mr. Findlay's handwriting.

Q. 97. Don't you know Mr. Findlay's handwriting?

A. It is written in pencil; I would take it to be his.

Q. 98. You were in the bank with him and familiar with his handwriting?

L. T. Stallings.

A. Fairly so, he had been in there only a short time. (Mr. Findlay here stated the copy statement was in his handwriting.)

Q. 99. I want you to state whether or not under No. 15 Exchanges for Clearing House, \$127,188.79, whether if any of that amount consisted of the clearing house balance against Plant's Son, whether it was included in the amount under liabilities of officers and directors?

A. Personal liabilities?

Q. 100. Yes, sir?

A. No, it was not included.

Q. 101. Carried as cash?

A. Carried as cash.

Mr. Callaway: We introduce it as exhibit No. 9 (10?).

Mr. M. D. Jones: Plaintiff objects to its relevancy and materiality, and also objects to the evidence of Mr. Stallings explanatory of the report and identifying it upon the same ground.

Q. 102. Look at exhibit No. 2, identified by you, the clearing house sheet, and state on March 28, the amount of balance that was due the First National Bank by I. C. Plant's Son in the clearing house?

A. The balance held against the Plant Bank in the First National, debit balance, was \$104,500.

Q. 103. Will you look on page 215 of this cash book and see what the net discounts for Mr. Plant amounted to that day—how much did they amount to?

A. Why, I cannot tell you definitely from what source they were obtained, but the amount is \$12,877.17.

Q. 104. Are not those items, the seven items aggregating \$12,877.17, are not those—were not those discounts for Mr. Plant?

A. I cannot tell by this record here.

Q. 105. What can you tell from?

A. I can tell by the discount register. You would have to go and pick these items out one by one. There is no mark there indicating from whom we got the items.

Q. 106. See if you find on page 215 of your cash book fourteen items, May 11, 1904, on loans and discounts, aggregating \$12,877.17?

A. Yes, I find them.

Q. 107. And on page 214 of the same date, \$18,000, discounted for R. H. Plant?

A. Yes, sir.

Q. 108. On page 210, see if you do not find 11 items, \$18,328, under the head of loans?

A. Yes, sir.

L. T. Stallings.

Q. 110. On April 27, page 194, Acme Brewing Company, \$20,000, do you find that?

A. Yes, sir.

Q. On page 191, McCaw Manufacturing Company, \$10,000?

A. Yes, sir.

Q. 111. The Red Cypress Lumber Co.?

A. \$10,000.

Q. 112. Hodgson, \$100.54?

A. Yes, sir.

Q. On page 180, April 15, seven items aggregating \$15,122.15 of loans and discounts?

A. Yes, sir.

Q. Now, Mr. Stallings, those that I have just called your attention to, I will ask you a little later to look up on the loan and discount register and see if you do not find all of those were discounted or rediscounted by R. H. Plant for the First National Bank?

Mr. M. D. Jones: Plaintiff objects to the entire evidence of Mr. Stallings, on the ground that the same is irrelevant and immaterial, except the evidence of Mr. Stallings as to the transaction connected with the three thousand dollar check, the subject matter of this suit.

Cross-examination by Mr. M. D. Jones:

Q. 115. You can't say definitely, can you, that three thousand dollar check is part of the \$110,279.73 credit on May 13, 1904, on the clearing house balance, can you, on May 13, 1904, the clearing house balance sheet of L. C. Plant's Son shows a credit of \$110,279.73—you could not undertake to give the items that constitute that, could you?

A. No, I cannot.

Q. 116. And you cannot say that that \$3000 check which is the subject matter of this suit, was included in that \$110,279.73?

A. Positively, I could not.

Q. It might have gone for something else?

A. It is possible it might have gone to something else.

Q. 117. Mr. Plant might have got the cash on it?

A. He might have.

Q. As far as you can positively say, he did get the cash on it?

A. I don't remember anything at all about it.

Q. 120. This clearing house sheet of May 13, 1904, shows, does it not, that Mr. Plant put with the First National Bank on that day \$110,279.73?

A. He had a claim against them for that amount.

L. T. Stallings.

Q. 121. Various checks or cash items or claims of some sort against the First National Bank.

A. Yes, sir.

Q. 122. And it also shows that the First National Bank had an aggregate clearing house balance against Plant's Bank of \$82,736.65?

A. Yes, sir.

Q. 123. And shows, does it not, that Mr. Plant had a claim against the clearing house of \$2455.56?

A. Yes, sir.

Q. A balance, I mean, after settling all the indebtedness of the other banks.

A. Yes, sir.

Q. And most of that balance was against the First National Bank, was it not?

A. I cannot tell, unless I could see the other tally sheet.

Q. 126. Could not you take those figures right there—

A. No, sir; I would have to see the statement of the bank's settlement on the tally sheet.

Q. 127. Would not this credit over here on the same day on this credit, clearing house balance show you that?

A. It might, on their books, I don't know anything about that.

Q. 128. This is the clearing house book, as I take it, this shows there \$110,279.73 against them, and you had against him \$82,736—then you would owe him the difference between those two?

A. I don't know whether we would or whether we owed the other banks it, you see this is a matter against the clearing house.

Q. 129. As between the First National and Plant, the First National would owe Plant the difference between \$110,279.73 and \$82,736?

A. If you will eliminate the other banks it would be so, but as a matter of fact, when we went into the clearing house, we didn't count we owed any individual bank.

Q. 130. You just settled balances, instead of settling the differences?

Not answered.

Q. 131. When did that three thousand dollar check go off to the American National Bank?

A. As is stated a moment ago, in the ordinary course of business, it left the office on the night of the 13th.

Q. 132. When would it get to Nashville?

A. The report from Nashville shows it never got there till the 14th.

L. T. Stallings.

Luther Williams.

Mr. A. L. Miller: It is not competent for you to say that, because that report is in writing.

Q. 133. Did you ever get a report from the American National Bank of Nashville, acknowledging this check?

A. Yes, sir; we got an advice of credit—the amount was credited to the First National Bank's account.

Q. 134. Have you got that paper?

A. It is in the records of the old First National.

Q. 135. We will tender the clearing house sheets identified by Mr. Stallings and also a copy of the report to the Comptroller of the Currency identified by Mr. Stallings.

Mr. Jones: Plaintiff objects to the admissibility of the clearing house receipts and to the report to the Comptroller as being irrelevant and immaterial.

Mr. Callaway: Mr. Stallings, have you examined, since your previous testimony, the books of the First National Bank to see whether the items that I called out to you as having been discounted—purporting to have been discounted for Mr. Plant on May 11, 1904, April 30, April 27, May 3, April 23, and April 15, all in 1904, were discounted by the First National Bank for R. H. Plant?

A. Yes, sir; or I. C. Plant's Son, I have.

Q. 136. They were discounted for Mr. Plant?

A. Yes, sir.

Luther Williams, a witness produced on behalf of the defendant, being first duly sworn, deposes and says, as follows:

Direct examination by Mr. Callaway:

Q. 138. State your occupation and residence?

A. Occupation is banking and collecting; residence 504 Walnut Street, Macon, Ga.

Q. 139. Were you—did you hold an official position with the First National Bank in the year 1904?

A. For the first few days of 1904, yes, sir.

Q. 140. When did you leave the First National Bank?

A. As near as I can recollect the date was January 12, 1904?

Q. 141. Mr. Williams, state whether at that time, at the time you resigned that position, any of these clearing house balances of Mr. R. H. Plant's were being carried by the First National Bank?

A. I can't state positively, in all probability they were; it was a general thing.

Mr. M. D. Jones: We object to all probabilities.

A. It was a general thing; I will put it that way.

Q. 142. To carry those balances?

Luther Williams.

L. T. Stallings.

A. Yes, sir.

Q. 143. State whether or not the carrying of those balances had anything to do with your resignation?

A. That was the primary cause among other things.

Mr. M. D. Jones: We object to that, because it is irrelevant.

Q. 144. State whether or not you so stated to Mr. Plant?

A. I did, sir, in the letter of resignation to Mr. Plant. I will withdraw that, in the letter of resignation to the chairman of the Board, who was to preside at the meeting on January 12th.

Mr. A. L. Miller: You ought not to state what was stated in the letter—the letter itself will tell that.

Q. 145. Did you state at any time to Mr. Plant or any of the directors anything with reference to your objection to carrying these clearing house balances?

A. Yes, sir.

Q. 146. To whom, do you remember?

A. In the previous October, I went to see directors Wilson and Williams about the matter.

Q. 147. Did you ever take up the matter with Mr. Plant personally?

A. Yes, sir; several times.

Q. 148. About carrying those balances?

A. Yes, sir; several times.

Mr. M. D. Jones: We object to the evidence of Mr. Williams as immaterial and irrelevant.

Stallings recalled:

Mr. L. T. Stallings recalled by plaintiff for the purpose of re-cross-examination, testified:

By Mr. Jones:

Q. 149. How long had you been in the employ of the First National Bank?

A. I had been there about sixteen years.

Q. 150. You had a great many dealings with Mr. Plant, did not you?

A. Yes, sir.

Q. 151. And with Mr. Plant's bank?

A. Yes, sir.

Q. 152. And Mr. Plant was a man of very large business, was he not, he had a great many business enterprises on foot all the time?

A. Yes, sir.

Q. 153. He dealt in large figures and large amounts every day?

L. T. Stallings.

A. Yes, sir.

Q. 154. An item of three thousand dollars was an exceedingly small matter with him?

A. Why, yes, ordinarily, it was a small matter.

Q. 155. He was a very wealthy man, so far as you knew, at that time, was he not?

A. Yes, sir.

Q. 156. You esteemed him and considered him a very wealthy man, did you not?

A. Yes, sir.

Q. 157. Worth something like a million dollars?

A. I didn't know what he was worth; I regarded him with others as being wealthy.

Q. 158. He was regarded as the wealthiest man in Macon?

A. I don't know about that.

Q. 159. Well, one of the wealthiest men in Macon?

A. Yes, sir.

Q. 160. He was regarded as being thoroughly successful in everything he undertook, was he not?

A. Yes, sir; that was his reputation.

Q. 161. And was making money?

A. Yes, sir.

Q. 162. And so far as you know, this item of three thousand dollars may have gone into any other of those ventures which were being controlled by Mr. Plant, might it not?

A. Yes, sir; I didn't know what was back of it.

Q. 163. Mr. Plant was largely interested in the McGaw Manufacturing Company, was he not?

A. Yes, sir.

Q. 164. And that consumed a large amount of money all the time, every day, didn't it?

A. It took a good deal of money to run it.

Q. 165. And, so far as you know, this three thousand dollars might have gone to McGaw Manufacturing Company?

A. Well, I didn't know where it went.

Q. 166. He was also interested in the brewery?

A. Yes, sir.

Q. 167. And the brewery consumed a large amount of money continually, did it not?

A. Yes, sir.

Q. 168. And at that particular time they were using a particularly large amount of money, were not they, they were making improvements on the brewery, if you recollect?

L. T. Stallings.

A. I don't know about that.

Q. 169. Do you recall about that time they issued preferred stock for about one hundred thousand dollars?

A. I don't remember that. I knew there was a transaction of the kind.

Q. 170. You don't remember the date?

A. No, sir.

Q. 171. You do know the brewery used a great deal of money all the time, do you not?

A. Yes, sir.

Q. 172. Mr. Plant was largely interested in the brewery?

A. Yes, sir.

Q. 173. Mr. Plant was financing the brewery, was he not, as well as the McGaw Manufacturing Company?

A. Yes, sir.

Q. 173. What was his relation to the brewery? He was president as well as financial agent?

A. At that time he was president of the brewery.

Q. 174. And president of the McGaw Manufacturing Company, also was not he?

A. Yes, sir.

Q. 175. What were his relations to the Red Cypress Lumber Company?

A. Mr. Plant was financiering that also.

Q. 176. And that consumed large quantities of money, didn't it?

A. Yes, sir.

Q. 177. And, so far as you know, this check might have gone into the Red Cypress Lumber Company, so far as you can say to the contrary?

A. That they got the benefit of it?

Q. 178. Yes, sir?

A. I don't know who got it, sir.

Q. 179. He was also managing the New York Life Insurance Company Agency here at that time, was he not?

A. Yes, sir.

Q. 180. Mr. Plant also had a racing track and a string of race houses and a farm and a flower nursery out near Macon, did he not?

A. Yes, sir.

Q. 181. A great deal of money was used in operating that, in keeping it up, financing it?

A. I don't know so much about that—that never came under my observation.

Q. 182. You know the expense of running that was very heavy, don't you?

L. T. Stallings.

A. Of my own knowledge, I did not.

Q. 183. So far as you know the proceeds of that three thousand dollar check in issue here, might have gone on the farm?

A. So far as I know.

Q. 184. That farm was called the Idle Hour Nurseries, was it not?

A. The farm was called the Idle Hour Farm, the nurseries were called the Idle Hour Nurseries.

Q. 185. Sometimes called Folly Farm, wasn't it?

A. No, I think that was Jaques'.

Re-direct examination by Mr. Callaway:

Q. 186. You knew Mr. Plant had sold out that New York Life Insurance business a few months previous to the failure of his bank?

A. Yes, sir; in answering his question there with regard to Mr. Plant's insurance business, I didn't understand the scope of his question. I knew he had sold out his interest.

Q. 187. He had sold out most of his race horses before the failure?

A. I didn't know that.

Re-cross-examination by Mr. M. D. Jones:

Q. 188. Was it not generally understood he got an enormous amount of money for the sale of his interest in the New York Life Insurance Company?

A. Yes, sir; I know that was generally thought.

Q. 189. And the sale of the New York Life Insurance Company agency would rather have raised his reputation than lowered it, for wealth?

A. Yes, sir; I heard a good many people speak of it in that connection.

Mr. Callaway:

Q. 190. What did you know about it?

A. I knew nothing.

Mr. Calaway: We object to any testimony in regard to the matter.

Mr. Stallings: Mr. Findlay has called my attention to a mistake I made in my testimony, that is in regard to Mr. Plant's actual connection with the McGaw Manufacturing Company and the Brewery; while he was recognized as prominently connected with them and financiering these two institutions, he was not president of these two institutions at the time.

Mr. Callaway: Mr. Plant was the financial agent, you might say, was he not, of the McGaw Manufacturing Company?

A. Yes, sir.

J. N. Talley

J. N. Talley, a witness produced on behalf of the defendant, being first duly sworn, deposes and says as follows:

Direct examination by Mr. Callaway:

Q. 193. Give your occupation and place of business?

A. Attorney at law; I reside at Macon, Georgia.

Q. 194. You are the trustee in bankruptcy for R. H. Plant?

A. Yes, sir.

Q. 195. What is the aggregate amount of dividends that have been paid in the Plant estate to creditors?

A. 35 1-6 per cent of the proved claims.

Q. 196. Can you form any estimates about what, if any, additional dividends will be paid?

A. About two per cent.

Q. 197. About what has been the aggregate cash assets coming into the hands of the trustee in bankruptcy?

A. About \$720,000 from the life insurance and about \$250,000 from the other assets.

Q. 198. The life insurance accrued on policies on the life of Mr. Plant?

A. Yes, sir.

Q. 199. His death occurred subsequent to his bankruptcy, did it not?

A. Subsequent to the filing of the petition in bankruptcy against him.

Q. 200. What are, approximately, the liabilities of the Plant estate, allowed by the referee?

A. About \$2,200,000.

Q. 201. Did that include any of the liabilities upon paper of the Red Cypress Lumber Company or the McGaw Manufacturing Company upon which Mr. Plant was endorser?

A. No, it does not.

Q. 202. What was the approximate amount of Mr. Plant's liability as endorser upon the paper of the McGaw Manufacturing Company?

A. About \$1,054,000, is my recollection.

Q. 203. And as endorser upon the paper of the Red Cypress Lumber Company?

A. About \$543,500.

Mr. M. D. Jones: We object to the evidence of Mr. Talley as immaterial and irrelevant.

Q. 204. Have you got the individual ledger?

A. Yes, sir.

Richard S. Findlay.

Q. 205. Will you state the amount standing to the credit of the McGaw Manufacturing Company at the date of the failure of Mr. Plant?

A. \$594,489.34.

Q. Please state the amount to the credit of the Red River Cypress Company the same date?

A. \$119,422.04.

Mr. M. D. Jones: We offer the same objection to the testimony of Mr. Talley as immaterial and irrelevant.

Mr. Talley: Mr. Plant was indebted to the McGaw Manufacturing Company for \$88,000 for the balance due upon his subscription to stock, in addition to the amount standing to their credit on his ledger.

Richard S. Findlay, a witness produced on behalf of the defendant, being duly sworn, deposes and says as follows:

Q. 208. What is your occupation and residence?

A. My residence is Macon, Georgia, my occupation is employe of the American National Bank at present.

Q. 209. In 1904 were you the cashier of the First National Bank?

A. I was cashier from the first of February up to the date of the suspension, three and one-half months.

Q. 210. Previous to that time what was your business?

A. Since the first of October, 1903, I was cashier of the Macon branch of the New York Life Insurance Company; for about ten years prior to that, I was cashier of Mr. Plant's agency—after he disposed of his interest, I was retained by the Company in charge of the office.

Q. 211. Mr. Plant sold his interest in the New York Life Insurance agency at what time?

A. He sold it September 30, 1903, the contract took effect.

Q. 212. Mr. Plant also previous to the failure of his bank also sold off a considerable number of his racing horses didn't he?

A. I don't know; I had no personal knowledge of that. I know he was buying and selling horses pretty much all the time.

Q. 213. Did you control the discounts and papers taken in the Plant National Bank as cashier, or was that under the direction of Mr. Plant?

A. Mr. Plant had charge of that—when I went over there, he told me he wanted me to do practically nothing for a while until I could familiarize myself with things and the customs of the bank and then, as he explained it, he said, you and I together will look after the discounts.

Richard S. Findlay.

They were left to him. I really didn't know the custom of the bank with the exception of a few small minor loans. I didn't pass on any of those things except under his direction.

Q. 214. The indebtedness of Mr. Plant to the First National Bank was it controlled by him or by you?

A. It was controlled by him.

Q. 215. The clearing house balance that was carried by the First National Bank against Mr. Plant was it controlled by you or by him?

A. Well, that was just a matter of long standing, the way they managed things regarding the clearing house and it went on as it had gone on for years after I went in.

Q. 216. You resigned your position with the First National Bank and went up to the First National Bank after Mr. Luther Williams resigned?

A. I resigned with the New York Life Insurance Company and went up to the bank.

Q. 217. And succeeded Mr. Luther Williams, the previous cashier?

A. Yes, sir.

Q. 218. Did Mr. Plant make any statement to you about the transactions of the bank were to be known only by you and him?

A. No, sir.

Q. 219. The papers and checks that were turned into the bank on May 13, among which was this check on the American National Bank of Nashville, you would not have declined any of them checks and papers, would you—you just accepted whatever Mr. Plant sent in there as all right?

A. Do you mean of that particular bunch of papers that was sent in that day?

Q. 220. Yes, sir.

A. Why no, they were all sent in for credit, I would not decline anything that was tendered for credit.

Q. 221. The \$12888 of discounts that went to make up that deficit, you would not have declined those either?

A. No, not if he tendered them, I would not have declined them.

Q. 222. What time on Monday did you know of the failure of the private bank of I. C. Plant's Son to resume business?

A. I suppose it was just about nine o'clock, possibly a few minutes before. I had gone over to the insurance office to get some information about a matter I was looking into and while over there I heard that a notice had been

Richard S. Findlay.

posted on the door of Plant's bank, that was the first I heard of it.

Q. 223. And there was a subsequent run on the First National?

A. Yes, sir.

Q. I believe Mr. Stallings testified you closed the doors about half past nine.

A. I think it was not later than half past nine—twenty or thirty minutes, along about that, just long enough to call the directors together and have a meeting to pass on it.

Q. 225. The capital of the bank was how much, Mr. Findlay?

A. \$200,000.

Mr. M. D. Jones: We object to all the evidence of Mr. Findlay as being immaterial and irrelevant.

Cross-examination by Mr. M. D. Jones:

Q. 226. I will ask you then do you know that Mr. Plant did give the First National on May 13, 1904, a check for three thousand dollars on the American National Bank of Nashville?

A. Yes, sir; I know that.

Q. 227. You don't know whether Mr. Plant got the cash on that check or not?

A. No; I do not.

Q. 227. You don't know how he used the check?

A. I just know such a check was taken in that day, but I don't know whether it was placed to his credit or whether it was cashed for him, or whether it was credited on Plant's Son's clearing house balance. I merely know that such a check was handled there.

Q. 228. The First National Bank of Macon sent that check to the American National Bank of Nashville, they sent that in on the 13th to the Nashville bank?

A. Yes, sir; I presume so; I didn't handle that personally.

Q. 229. Mr. Plant was presumed to be a man of great wealth, was he not?

A. Yes, sir; he was so considered. I with others here considered him to be so.

Q. 230. He was reputed to be amongst the wealthiest men in Macon, was he not?

A. Yes, sir; I so considered him.

Q. 231. He had a great many business enterprises on foot all the time, did he not?

A. Yes, sir.

Q. 232. And all of these enterprises appeared to be successful, did they not?

Richard S. Findlay.

A. Yes, sir; so far as I know.

Q. 233. They were generally supposed by the public to be successful?

A. Yes, sir.

Q. 234. It required a large amount of money to run these different enterprises, did it not?

A. Yes, sir.

Q. 235. The amounts of money that Mr. Plant was using about the time the bank failed, were not in excess of what he had always been using, were they?

A. Well, I hardly know just how to answer that—during my 3 1-2 months' connection with First National Bank I suppose that that time the clearing house balance was larger than it had been prior to my connection with the bank—I didn't know just how large the balance was, except that it was a matter of general knowledge around the bank that the balance usually was with the First National and had been for years—they had been doing business just that way.

Q. 236. Mr. Plant financed the brewery, did he not?

A. Yes, sir; I think he was looked upon as financing the brewery and directing its policies.

Q. 237. And also the McGaw Manufacturing Company, was he not?

A. Yes, sir.

Q. 238. And the Red Cypress Lumber Company?

A. Yes, sir.

Q. 239. And for a long time, the New York Life Insurance Company in Georgia, Florida and Tennessee?

A. Yes, sir.

Q. 240. His Idle Hour Farm and Idle Hour Nursery required large sums of money for their financing and his race horses?

A. Well, it was generally understood he spent a good deal of money on them.

Q. 241. He was generally supposed to be perfectly solvent, was he?

A. Why, I think so; I never questioned his solvency.

Q. 242. How long had you been intimately associated with him before his bankruptcy?

A. Why, since March, 1894, except for about three years when I was quite a boy, I was connected with the bank, too young, then, to know.

Q. 243. For ten years you had been intimately associated with him, then, and knew about his different businesses and different enterprises?

Richard S. Findlay.

A. Yes, well, I didn't know very much about any of his different interests, except the insurance business—I was familiar with and thoroughly conversant with that, but the others I didn't just how he was getting along with them, except in a general way, he was considered to be successful with them all right.

Q. 244. You remember when Mr. Plant sold out his life insurance agency, don't you?

A. Yes, sir.

Q. 245. What was the general impression here as to whether that increased his solvency or diminished it?

A. I don't know that I heard any expression on that particular point, except that it was generally believed and considered that he received a very large amount for that business.

Q. 246. Something like a million dollars, was it not?

A. Why, it was estimated all the way from a half million up to a million.

Re-direct examination by Mr. Callaway:

Q. 247. Did you know yourself, Mr. Findlay, what Mr. Plant received for that?

A. Yes, sir.

Q. 248. How much?

A. He received \$250,000.00.

Q. 249. And owed the New York Life \$100,000.00?

A. Yes, sir.

Q. 250. He received \$150,000.00 net for it?

A. Yes, sir.

Q. 251. Did you know what time during the morning of the 16th that Mr. N. B. Corbin took possession of the R. H. Plant affairs as receiver in bankruptcy?

A. No; I do not. In fact I didn't know he took hold that particular day.

By Mr. Callaway: I tender the abstract from the books of the First National Bank, made up by L. T. Stallings, the bookkeeper of the bank, showing statement of personal liabilities of R. H. Plant to the First National Bank at the time of the failure, May 16, 1904, the statement including note of \$18,000.00 due directly by R. H. Plant to the bank, and the balance consisting of notes and bills discounted upon which R. H. Plant was security or endorser to the bank, aggregating as a whole, \$523,938.69, the clearing house balance of \$88,000.00 shown having been settled up on May 13 and 14, 1904, but which was in part (in part is in the margin in pencil, H. M. D. Clerk.) subsequently returned to the receiver of Robert H. Plant by the receiver of the First National Bank in settlement of a suit by

the representative of Robert H. Plant against the receiver of the First National Bank, alleging the same to have been paid as a preference, and which amount of \$88,000 was thereafter proved by the receiver of the First National Bank as a claim against the estate in bankruptcy of Robert H. Plant (Exhibit No. 11).

The necessity of signature to the foregoing witnesses waived. This 13 day of July, 1908.

W. P. Callaway,

Atty. for American National Bank.

Miller, Jones & Miller,

for A. L. Miller, Agent.

I, the above-named notary public, do hereby certify that pursuant to the annexed notice issued and served in the above-mentioned cause, wherein A. L. Miller, as agent of the First National Bank of Macon, is plaintiff and the American National Bank of Nashville is defendant, I was attended at the office of A. L. Miller aforesaid by M. D. Jones, J. C. Morcock and A. L. Miller, of counsel for the said plaintiff and also by M. P. Callaway, of counsel for said defendant, on the several days and dates hereinbefore stated; that the aforesaid witnesses, L. T. Stallings, Luther Williams, Richard S. Findlay and J. N. Talley, who were of sound mind and lawful age, were by me first carefully examined and cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth, and they thereupon testified as is above shown, and that the depositions by them made as above set forth were by me reduced to writing in the presence of the witnesses themselves, and from their statements and were taken at the place in the annexed notice specified and at the times set forth, adjournments being had or taken from day to day as provided in said notice; and that all was so done in the presence of said counsel for said plaintiff and defendant and that said counsel have waived in writing the necessity of the signature of to these depositions by the foregoing witnesses, which waiver is hereto attached on page 35 hereof; I further certify that the reason for taking said depositions was and is and the fact was and is that all of the deponents live at Macon, Georgia, more than one hundred miles from the place where said suit is appointed by law to be tried; that I am neither of counsel nor attorney to either of the parties to said suits nor interested in the event of said cause; and that it being impracticable for me to deliver said depositions and the exhibits thereto attached with my own hand into the court for which they were taken, I have retained the same for the purpose of being sealed up and directed with my own hand, and speedily and safely trans-

mitted to the said court for which it was taken and to remain under my seal until then opened. As witness my hand and seal this July 14, 1908.

Charles D. S. Cork,

(Seal)

Notary Public Bibb County, Georgia.

The following exhibits are attached to the foregoing deposition, viz:

Exhibit No. 1.		
Plant's Son. No. 2. Mar. 15, 1904.		190
No.	Debit.	Credit.
1 First Nat.	77,055.45	11,083.00
3 Central Ga.	152.40	
4 Exchange	9,543.09	783.18
5 Macon Sav.	75.44	15.10
6 American Nat.	8,929.08	1,314.20
7 Com'l & Sav.	224.65	247.69
Total,	95,980.11	13,443.17

2,536.94

Paid through Macon Clearing House, Mar. 15, 1904,
American National Bank:

19.00
6.50
20.00
16.57
190.51
129.46
8.38
75.00
54.60
10.00
118.19
10.00
26.65
1.00
685.86
3,365.87
92.80
1.80
66.50
20.50
25.00
3,235.00
1,435.75
8,929.08

The Exchange Bank of Macon on 2 I. C. Plant's Son.

100.00
50.00
1.25
10.48
10.00
20.00
24.98
1.00
36.00
1.50
22.39
19.00
161.76
9.75
4.50
20.00
45.50
13.17
24.69
3.00
100.00
48.30
3.00
34.23
2.00
10.00
776.50
776.50
662.50
7,493.68
53.09
6.70
4.70
187.50
1.50
4.50
82.37
89.94
25.00
3.07
88.95
63.18
9,543.09*
58,421.14
10,000.00
49.72
22.50

2,532.73
 1.47
 5,000.00
 13.60
 89.77
 13.00
 30.00
 175.07
 202.45
 28.50
 397.00
 76,980.43
 40.00
 35.00

77,055.45

Paid through the Macon Clearing House, Mar. 5, 1904.
 American National Bank.

11.40
 2.12
 14.17
 58.95
 m13.96
 18.13
 5.00
 15.00
 3,000.00
 12.61
 16.90
 90.00
 107.63
 3,365.87

7. Commercial & Savings.

On No. 2.

Dollars.	Cents.	Dollars.	Cents.
	6.75		
	16.00		
	1.00		
	19.40		
	25.00		
	100.00		
	<hr/>		
	168.15		
	6.95		
	16.50		
	3.00		

27.50

2.25

229.65

3 Central Georgia Bank.

On No. 2.

Dollars.	Cents.	Dollars.	Cents.
			78.40
			74.00
			<hr/> 152.40

5 Macon Savings.

On No. 2. Mar. 15, 1904.

Dollars.	Cents.	Dollars.	Cents.
	15.00		
	60.44		
	<hr/> 75.44		

(The foregoing constitute Exhibit No. 1, and are statements and bank deposit and check slips pinned together. I find no marks linking them more together than as I have done in copying and I am unwilling to add explanations of my own; although they are intelligible in their form in the original and scarcely seem so as copied. H. M. D. Clk.)

Exhibit No. 3.

Plant's Son. No. 2. Mar. 30, 190

No.	Debit.	Credit.
1 First Nat.	114,824.01	7,827.40
3 Central Ga.	9.68	
4 Exchange	3,260.43	2,603.14
5 Macon Sav.	44.45	
6 American Nat.	3,576.35	299.05
7 Comm'l Sav.	28.90	110.10

Total,	122,701.24	10,839.69
--------	------------	-----------

Balance, 111,861.55

Paid through the Macon Clearing House, Mar. 30, 1904.

50.90

35.50

4.80

15.20

2,027.53

98.62

2,232.55

17.30

77.50

5.00

5.00
9.00
951.86
3.00
11.45
32.40
86.90
38.43
50.00
30.43
8.36
17.17
1,343.80
2,232.55 (In pencil,
<u> </u> Clk.)
3,576.35

No. 5 Macon Savings.
On No. 2 Mar. 30, 1904.

Dollars.	Cents.	Dollars.	Cents.
	10.00		
	14.85		
	19.60		
	<u> </u>		
	44.45		

99,500.00
150.00
4,003.71
1,007.00
157.60
28.06
844.97
48.77
37.17
16.00
3.00
20.00
3.80
3.40
114,824.01

The Exchange Bank of Macon. on 2 Plants.

4.00
52.27
36.66
8.00
300.00
15.00
4.00
36.83

5.00
 11.82
 20.00
 5.00
 5.00
 10.00
 5.00
 6.00
 4.85
 15.00
 5.00
 6.00
 3.00
 6.00
 25.00
 11.75
 601.18*
 601.18
 2,502.50
 14.85
 22.50
 60.00
 2.27
 37.13
 20.00
 3,260.43*

7 Commercial Savings.

On No. 2.

Dollars.	Cents.	Dollars.	Cents.
	16.00		
	2.00		
	<hr/>		
	18.00		
	10.00		
	<hr/>		
	28.00		

Exhibit No. 4.

Plant's Son. No. 2. Apr. 14, 190

No.	Debit.	Credit.
1 First Nat.	143,016.92	14,975.12
3 Central Ga.		91.33
4 Exchange	243.132	1,532.66
5 Macon Sav.	187.08	52.00
6 American Nat.	5,243.23	2,298.77

Total,	150,925.00
Balance,	131,682.95

19,242.05

11.33

35

977.71
 47.41
 8.96
 1,200.00
 17.00
 18.25
 2,277.66
 2,948.07
 10.00
 7.50

 5,243.23

129,196.42
 15.00
 12.25
 18.90
 100.55
 14.95
 10,007.50
 12.00
 2.40
 3.60
 398.22
 128.21
 16.66
 3.50
 10.47
 11.89
 2,700.00
 21.15
 28.50
 20.97
 22.50
 15.00
 31.28
 225.00
 143,016.92*

Paid through the Macon Clearing House, Apr. 14, 1904.
 American National Bk.

126.00
 25.25
 5.00
 49.88
 83.49
 137.43
 532.50
 444.00
 163.97

200.00

187.54

17.46

49.54

131.40

6.75

14.25

30.38

4.60

4.50

50.00

130.07

29.69

185.52

10.50

84.75

95.15

148.45

2,948.07

The Exchange Bank of Macon on 2 I. C. Plant's Son.

5.00

10.00

43.00

2.40

75.00

25.00

8.15

26.78

4.60

5.00

13.75

6.12

165.75

34.00

17.76

67.93

29.15

19.31

78.11

4.08

50.00

100.00

31.80

9.00

3.95

2.00

10.87

30.00

20.76
 15.75
 914.84*
 914.84
 25.00
 101.56
 4.41
 1,152.00
 88.50
 4.16
 15.00
 23.80
 5.00
 5.00
 16.00

11.10
 16.05
 38.00

2421.32

5 Macon Savings on No. 2, Apr. 14, 1904.

Dollars.	Cents.	Dollars.	Cents.
	10.60		
	6.06		
	49.96		
	81.72		
	5.87		
	17.37		
	18.75		
	1.75		

187.08

7 Commercial & Savings. On No. 2.

Dollars.	Cents.	Dollars.	Cents.
	16.80		
	7.15		
	15.30		
	10.00		
	7.20		

56.45

Exhibit No. 5.

Plant's Son. No. 2, Apr. 15, 1904.

No.		Debit.	Credit.
1	First Nat.,	129740.39	21294.25
3	Central Ga.,		29.74
4	Exchange,	8549.68	3014.39
5	Macon Sav.,	1213.99	27.33

6 American Natl.,	3712.97	1562.72
7 Com'l & Sav.,	2117.47	174.05

Total,	145334.50	26082.48
--------	-----------	----------

Balance,	119252.02
----------	-----------

7. Commercial and Savings. On No. 2.		Dollars.	Cents.
Dollars.	Cents.		
	25.22		
	3.00		
	75.00		
	4.60		
	9.65		
	<hr/>		
	117.47		
	2		

Paid through the Macon Clearing House, Apr. 15, 1904,
American National Bank.

277.24
1000.00
50.00
34.45
31.85
8.64
53.78
12.50
36.00
17.79
120.38
1.25
12.50
8.75
150.00
20.00
75.00
13.09
61.55
67.77
8.70
<hr/>
2061.25
10.60
38.52
20.26
176.06
252.78

39

49.15
44.95
1022.64
28.19
5.85
1649.00
2061.24
2.77

3712.97

5 Macon Savings. On No. 2, Apr. 15, 1904.
Dollars. Cents. Dollars. Cents.

87.59
1000.00
34.80
75.00
49.60
22.00

1213.99

124600.36
26.00
100.00
200.00
225.00
134.61
12.03
19.80
5.04
14.17
13.58
1000.00
16.28
9.50
7.00
10.68
10.90
10.70
72.00
5.00
3000.00
17.50
34.97
36.54
144.78
24.00

129740.39*

The Exchange Bank of Macon, on 2 I. C. Plant's Son.

13.50
5000.00
13.93
95.78
8.00
10.00
20.00
55.85
78.37
25.00
17.94
1.07
3.00
1.00
15.00
5.00
5.00
3.00
5.00
8.00
7.00
6.00
6.75
1.00

5405.19*

5405.19
1317.25
194.11
385.80
100.00
75.00
596.05
20.02
60.00
147.60
7.50
3.50
40.00
43.37
50.00
20.00
84.29

8549.68*

Exhibit No. 6.

Plant's Son, No. 2, May 11, 1904.

No.	Debit.	Credit.
1 First Nat.,	109924.73	2200.413
3 Central Ga.,		61.62
4 Exchange,	3816.07	1824.72
5 Macon Sav.,		81.50
6 American Natl.,	1650.14	563.35
7 Coml. & Sav.,	2031.31	682.87
Total,	117422.25	
		252.18
Balance,	92204.06	

Exhibit No. 7.

Plant's Son. No. 2. May 12, 1904.

No.	Debit.	Credit.
1 First Nat.,	97771.59	10922.68
3 Central Ga.,		
4 Exchange,	1711.23	1159.91
5 Macon Sav.,	10.26	8.80
6 American Natl.,	1376.99	67.23
7 Coml. & Sav.,	1038.01	174.57
Total,	101908.08	12333.19
Balance,	89574.89	

2.50
3.00
3.50
14.65
30.21
26.00
2.42
22.03
136.77
10.00
2.50
6.95
17.50
5.00
205.60
115.78
37.50
641.91

5.95
11.80
42.55
42.75

42

1.00
23.54
35.00
5.70
1.14
10.20
25.00
9.75
23.85
4.50
6.65
26.75
50.00
6.00
21.50
52.00
163.98

568.61
641.91
157.47
10.00
5.00

1376.99

The Exchange Bank of Macon. On 2 I. C. Plant's Son.

•
•
12.80
25.74
4.56
10.25
23.40
69.10
1.50
5.00
8.75
9.50
15.00
83.36
40.92
20.00
2.00
3.06
300.00
12.50
5.25
19.16

29.36
12.69
17.00
017.10
58.38
35.00
49.47

(The foregoing deposit slip, or check slip, is torn off at "49.47" and, being without footings, I suppose it is incomplete—H. M. D. Clk.)

840.95.84
113.79
1500.00
10.80
36.46
64.95
1.35
2.25
29.09
8.17
34.9
9.59
1000.00
119.66
15.00
43.63
6.00
5003.75
136.44
1.70

97771.59*

5 Macon Savings.		On No. 2, May 12, 1904.	
Dollars.	Cents.	Dollars.	Cents.

10.76

7 Commercial and Savings.		On No. 2.	
Dollars.	Cents.	Dollars.	Cents.

956.75

20.00

13.81

3.00

11.29

15.91

13.75

3.50

1038.01

Exhibit No. 8.

Plant's Son. No. 2, May 13, 1904.

No.	Debit.	Credit.
1 First Nat.,	82736.65	110279.73
3 Central Ga.,		100.00
4 Exchange,	3038.93	2341.50
5 Macon Sav.,	25.00	74.43
6 American Nat.,	3565.12	1134.66
7 Com'l Sav.,	60.04	52.25
	<hr/>	
Total,	89425.74	113982.57
	<hr/>	
Balance,		24556.87
		•
		•
		•
		73893.25
		7.92
		5005.00
		100.00
		8.64
		109.89
		53.04
		18.98
		10.50
		1170
		229.36
		54.60
		10.63
		3000.00
		16.79
		103.00
		16.45
		14.90
		72.00
		82736.65*
Exchange Bank of Macon on 2 I. C. Plant's Son.		•
		10.00
		4.50
		216.58
		2.72
		4.76
		78.83
		5.00
		5.65

2.28
 11.90
 47.36
 63.09
 7.00
 1.35
 16.15
 20.00
 2.00
 18.00
 4.00
 6.00
 100.00
 12.50
 5.90
 7.65
 22.28
 118.84
 11.77
 44.55

850.56*
 850.56
 2.00
 108.00
 24.05
 183.64
 1043.95
 28.25
 1.75
 6.10
 4.00
 15.97
 5.00
 242.81
 134.01
 10.35
 20.50
 205.00
 150.00
 2.99

3038.93*

5 Macon Savings. On No. 2, May 13, 1904.
 Dollars. Cents. Dollars. Cents.
 25.00

2.00
 12.65

94.75
 50.86
 35.00
 60.00
 13.00
 25.00
 20.22
 31.25
 7.65
 10.00
 3.15
 403.95
 26.60
 27.80
 1.29
 13.86
 2.50
 10.73
 63.17
 1259.15
 175.00
 100.00

 2449.58
 425.52
 681.62
 8.38

 3565.12

12.00
 8.75
 6.50
 12.93
 23.99
 361.35

425.52

7 Commercial Savings. On No. 2.			
Dollars.	Cents.	Dollars.	Cents.
	5.00		
	19.80		
	4.00		
	10.00		
	13.00		
	3.14		
	<hr/>		
	54.94		

5.10

60.04

Exhibit No. 9.

Plant No. 2. May 14, 1904.

No.	Debits.	Credits.
1 First Nat.,	73247.75	21180.29
3 Central Ga.,	44.68	10.10
4 Exchange,	2823.08	849.53
5 Macon Sav.,	572.53	72.
6 American Nat.,	1841.65	1215.
7 Com'l & Sav.,	44.86	133.
Total,	18574.55	24658.18

(Of the foregoing the balance and some of the other figures are torn off. H. M. D. Clk.)

62.45
 16. 5
 7.65
 293.24
 4.16
 5.55
 4.60
 1.05
 1.00
 2.15
 4.00
 13.50
 146.80
 7.43
 4.90
 40.00
 9.50
 2.45
 15.00
 90.00
 25.00
 756.68
 962.99
 30.00
 91.98

1841.65

2.00
 500.00

4.00
66.00
15.90
125.75
134.34
15.00

962.99

5. Macon Savings.		On No. 2, May 14, 1904.	
Dollars.	Cents.	Dollars.	Cents.
	2.10		
	570.43		
	<hr/>		
	572.53		

The Exchange Bank of Macon. On 2 I. C. Plant's Son.

1.60
20.00
6.85
4.33
4.75
49.75
7.65
10.85
10.50
10.40
15.90
125.00
7.25
93.00
21.55
27.50
15.00
8.10
3.00
3.00
6.00
7.36
459.34*
459.34
2.50
73.65
75.00
23.71
353.33
7.65
331.79
867.30

28.81
500.00
100.00
2,823.08*

20.00
5,005.00
22.50
5,000.00
13.16
22.45
38.68
470.97
32.00
2,607.99
15.00
13,247.75*

7 Commercial & Savings. On No. 2.			
Dollars.	Cents.	Dollars.	Cents.
	18.00		
	7.86		
	7.50		
	4.50		
	7.00		

44.86

Exhibit No. 10.

No. of bank, 1617. (Use the blank lines, if necessary, but do not erase or change any of the printed items). Treasury Department, Office of the Comptroller of the Currency, Form 36—Reports 2-6, 1903—50,000.

Report of the condition of "The First National Bank" at Macon, in the state of Ga., at the close of business on the 28 day of March, 1904.

Dr.	Resources.	Dollars.	Cents.
(Loans & discounts on which officers & directors are liable either as payers or endorsers (see schedule),	\$294,967.54		
1. (Loans & discounts on which officers & directors are not liable as payers or endorsers,	292,957.58	\$587,925.12	
2. Overdrafts, secured, \$—; unsecured, \$—; (See schedule)			1,364.87
3. U. S. Bonds to secure circulation, par value, — per			

cents, — per cents,		200,000.00
4. U. S. Bonds to secure U. S. Deposits, par value, — per cents,		40,000.00
5. U. S. Bonds on hand, par value, per cents,		
6. Premium on bonds for circulation, \$8,000.00, premium on other U. S. Bonds, \$1,600.00,		9,600.00
7. Stocks, securities, &c., including premium on same, (see schedule),		42,176.00
8. Banking House \$2,300, furniture & fixtures, \$4,000,		27,000.00
9. Other real estate owned, (See schedule),		11,500.00
10. Due from national banks (not approved Reserve Agents),		23,365.53
11. Due from state & private banks and bankers, trust companies and savings banks,		22,838.85
12. Due from approved reserve agents, (see schedule),		39,099.95
13. Internal revenue stamps,		
14. Checks and other cash items (see schedule),		264.44
15. Exchanges for clearing houses, (122,188.79)		126,188.79
16. Bills of other national banks,		6,450.00
17. Fractional paper currency, nickels and cents,		578.32
(Lawful Gold coin,	5,087.50	
(money in Gold certificates,	4,500.00	
(reserve Gold certificates		
(in bank payable to order,		
(Gold clearing		
18. (house certificates		
(Silver dollars,	2,395.00	
(Silver certificates,	4,600.00	
(Fractional silver		
(coin,	4,621.70	
(
(Total coin and		
(certificates,	21,204.20	
(Legal tender notes,	3,950.00	25,154.20

19. Redemption fund with U. S. Treasurer (not more than 5 per cent on circulation) 10,000.00
20. Due from U. S. Treasurer,

Total,		1,169,506.07	
Liabilities.		Dollars.	Cents.
1. Capital stock paid in,		\$200,000.00	
2. Surplus fund,		65,000.00	
3. Undivided profits, including amounts, if any, set aside for special purposes,	4,572.13		
Less current expenses & taxes paid,	3,998.00		574.13
4. Circulating notes secured by U. S. bonds,	\$200,000.00		
Less amount on hand and in treasury for redemption or in transit,		200,000.00	
5. State bank circulation outstanding,			
6. Due to national banks (not approved reserve agents),		22,339.60	
7. Due to state and private banks and bankers,		28,388.28	
8. Due to trust companies and savings banks,		408.82	
9. Due to approved reserve agents (see schedule),		5,050.10	
10. Dividends unpaid,	1,364.87		
11. Individual deposits subject to check,	278,515.43		
12. Demand certificates of deposit,			
13. Time certificates of deposit,	205,651.84		
14. Certified checks,	138.00		
15. Cashier's checks outstanding,		485,670.14	
16. United States deposits,		40,000.00	
17. Deposits of U. S. disbursing officers,			
18. Notes and bills rediscounted,		122,075.00	
19. Bills payable, including certificates of deposit representing money borrowed,			

20. Liabilities other than
those above stated,

Total,

\$1,169,506.07

I, R. E. Findlay, (cashier or president) of the above-named bank do solemnly swear that the above statement is true and that the schedules on back of the report fully and correctly represent the true state of the several matters therein contained, to the best of my knowledge and belief.

Correct.

Attest: _____

Cashier.

To be attested by three directors other than the officer verifying the report.

Directors.

Note: This report must be sworn to by the president or cashier, not by any other officer, attested by not less than three directors, and forwarded to the Comptroller of the Currency with the least possible delay, as it is desired to complete the summary of reports as soon as possible after a call has been issued.

Place for official seal to be affixed by officer before whom acknowledged. See Act Feb. 26, 1881. Notary must not be an officer or director of the bank.

State of _____ County of _____

Sworn to and subscribed before me this _____ day of _____, 190—.

Notary Public.

Certificates of Deposit representing money borrowed.

To whom issued.	Address.	Amount on demand.	Amount on time.
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None.

Rate of interest.

Total (include in item 19 liabilities).

Loans exceeding the limit prescribed by section 5,200 of the Revised Statutes, including amounts which exceed this limit due from State, private banks and bankers, trust companies, and savings banks, overdrafts, if any, to be classed with loans.

Name of borrower.	Enter full amount of loan.	Name of borrower.	Enter full amount of loan.
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None.

From. Balances due from or to approved reserve agents. To.

Enter name and location of bank.	Amount.
American Exchange, Park, Incp. & Tra., 1st Nat., Hanesville, Ky., Cont. Nat., Chicago, 1st Nat. Chicago, Nat. Bk. Com. St., Nat. Park No. 2 Collection, Nat. Bk. Sav.,	3,322.78 7,622.17 17,704.73 3,551.10 477.72 3,280.53 3,280.92 126.00 4,924.10

Total (item 12 resources)... Total (item 9 liabilities.)

Liabilities of officers and directors.

Names of official title officers.	Liability (individual or firm) as payers.	Liability Overdrafts individual or firm as indorsers or guarantors.	No. of shares stock owned.
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R. H. Plant, President	18,000.00	246,442.04	572
R. E. Findley, Cashier,			33.00 10
G. H. Plant, Vice-president, Asst Cashier,	7,500.00	500.00	10
A. Black, Director,	20,000.00	400.00	10
H. P. Williams, Director,	1,842.50	250.00	10

Total (see item 1 resources) 47,342.50 247,625.04 612

(Under last totals is written in pencil:) Liability of R. H. Plant as endorser is based on the rediscounting of commercial paper a large part of which is secured.

Loans & Discounts (including loans and discounts on which officers are liable.

A. On demand paper with one or more individual or firm names,	None.
B. On demand, secured by stocks, bonds and other personal securities,	None.
C. On time, paper with two or more individual or firm names,	318,966.73
D. On time, single paper (one person or firm) without other security,	130,929.39
E. On time, secured by stocks, bonds & other personal security,	137,504.00
F. Secured by real estate mortgages or other liens on realty, (see schedule),	None.

Total (item 1 resources), \$587,400.12

Enter the amount in each of these items, or write in the word "none," if there is no amount to enter.

Included in the above are:

G. Bad debts as defined by section 5204 Revised Statutes,	None.
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H. Other suspended and overdue paper, 525.00
Overdrafts.

Secured.

Standing 12 month or over,
Standing 6 months or over,
Temporary,
Officers and directors,
Total item 2 resources.

Unsecured.

Standing 12 months or over, None.
Standing 6 months or over, None.
Temporary, 1,364.87
Officers & directors, None.
Total (item 2 resources).

Stocks, securities, etc., (stocks, bonds, claims, judgments- and similar items should be included under this head.

Enter number of shares of stock or face value of bonds.	Name of corporation issuing stock or bonds, &c.	Amount at which carried on books.	Estimated actual market value.	State whether taken for "debts previously contracted."
300 shares	Acme Brewing Co.	30,000.00	30,000.00	Previous debt.
Insurance claim.	Thos. W. Troy.	12,176.00	12,176.00	Previous debt.
Total (item 7, resources),		42,176.00	42,176.00	

Other real estate owned.

Describe property state of conveyance form and of whom obtained.	Amount at which carried on books.	Estimated actual value.	State whether taken for "debts previously contracted."
House & lot war-rantee deed from C. M. Payne.	11,590.90	13,000	Previous debt.

Loans and discounts secured by real estate mortgages or other liens on realty.

Give name of borrower, form	Amount at which	Amount of prior lien	Estimated actual value.
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of collateral carried on on property,
described books. if any.
property.

None.

Checks and cash items other than exchanges for C. H.

Checks and drafts &c. in this city.

Not members of clearing house.

Checks & drafts of other banks not members of clearing house, estimated actual value of property. Date when security was taken. State whether taken for debt previously contracted. None.

Average reserve and interest.

Average reserve for the last 30 days (in bank and with reserve agent,) on deposit and bank balances was 193 per cent.

The highest rate of interest paid by the bank on deposit was 5 per cent.

On notes and bills discounted is 5 per cent.

And on bills payable. None.

Foregoing endorsed; No. of bank, 1617. Report of the First Nat. Bank located at Macon, Ga., March 20, 1904.

Here follows paper, described only at bottom, (clerk)

viz:

Due.	Name.	Amount.
5-3	Geo. L. Hodgson,	1,007.54
5-21	Hotel Lanier,	2,500.00
5-26	W. R. Holt,	500.00
5-31	J. Carlton Co.,	500.00
5-18	A. F. Whitney,	1,000.00
5-25	R. A. Muladyel,	3,000.00
5-25	R. A. Scandret,	300.00
5-7	W. R. Wore,	1,855.00
5-7	W. R. Ware,	405.00
6-10	R. H. Plant,	1,800.00
6-8	M. F. Hatcher,	17.75
6-15	E. L. Martin,	8.00
6-16	J. A. Newcomb,	3,500.00
6-29	G. S. Westcot,	2.25
6-3	A. R. Tinsley,	2,053.35
6-8	S. M. Silbers Son,	1,400.00
6-5	W. K. McRae,	507.00
6-1	S. M. Noble,	5,150.00
6-1	S. M. Noble,	5,198.12
6-14	C. D. Findlay, Agt.,	2,756.00
6-14	C. D. Findlay, Tr.	250.00
6-1	L. Park Lmbr Co.,	3,400.00
6-17	C. G. Land & L. Co.,	2,150.00

6-11 F. C. Ethridge,	1,500.00
6-21 Macon Mining Co.,	650.00
6-5 L. H. Zughard,	300.00
6-7 A. F. Wuhney,	1,000.00
6-15 P. Harris Sons,	1,167.00
6-17 Wright, Williams & Wadley,	6,000.00
6-24 Acme Brewing Co.,	10,000.00
7-24 Acme Brewing Co.,	10,000.00
6-24 R. A. Scandert,	400.00
Sundry notes out of town,	680.48
6-7 Turner C. L. Co.,	711.02
6-30 Wood Baker Co.,	3,167.08
6-25	3,167.09
7-9 T. P. Saffold,	3,567.50
7-1 W. H. Ketchum,	1,000.00
7-1 S. Hodgson,	1,000.00
Name & date torn off,	2,000.00
Name & date torn off (Clk)	400.00
Same (Clk.) and figures.	
7-10 A. R. Tucker,	520.00
7-15 Cent. Ga. L. & L. Co.,	3,650.00
7-23 Cent. Ga. L. & L. Co.,	3,650.00
7-7 L. H. Bingham,	350.00
7-29 L. Goldman,	300.00
7-7 Subers Son,	900.00
7-4 D. A. Allen,	117.45
7-1 W. H. Ellis,	101.43
7-16 Turner Cypress L. Co.,	3,000.00
7-4 H. Skinner,	366.68
8-13 H. C. Cook,	245.68
8-27 Same,	246.26
8-4 A. Black,	5,150.00
" "	5,000.00
" "	5,000.00
" "	5,000.00
8-15 S. S. Parnacle,	2,500.00
8-1 M. H. Blue,	569.81
8-8 J. F. Cane,	330.00
8-7 L. A. Mitchell,	1,000.00
8-5 Cent. Ga. L. & L. Co.,	4,000.00
8-2 W. R. Holt,	1,000.00
8-27 W. T. Morgan,	700.00
8-30 T. R. Ausley,	300.00
8-5 W. A. McK.,	500.00
(Names & Amts are torn off and mutilated— can't be deciphered—Clerk.)	
6-2 K. B. Tray,	17.48
7-4 Hotel Lanier,	3.50

7-13 S. E. McKenna,	5.10
8-20 J. F. Cone,	3.00
	<hr/>
	\$191,438.69
Sundry notes Red Cypress Co.,	134,500.00
McCaw Mfng Co.,	110,000.00
Add Clearing House balance, carried as cash,	88,000.00
	<hr/>
	\$523,938.69

Statement of personal liabilities of R. H. Plant to First National Bank of Macon, Ga., at time of failure. May 16, 1904.

L. T. Stallings.

The \$88,000.00 Clearing House balance was paid at 13th and 14th of May 19, but subsequently returned to estate of R. H. Plant Bank and subsequently proved as ordinary debt.

(The foregoing paper is very much mutilated—H. M. D. Clk.)

(The following figures appear as a slip attached, viz:)

1,007.54	(These figures are continued from the narrow slip attached—Clk.)
2,500.00	
500.00	
500.00	330.00
1,000.00	1,000.00
3,000.00	4,000.00
300.00	
1,855.00	1,000.00
405.00	700.00
18,000.00	300.00
1,775.00	500.00
800.00	1,500.00
3,500.00	500.00
225.00	453.50
2,053.35	5,000.00
1,400.00	3,500.00
507.00	350.00
5,150.00	334.38
5,198.12	1,000.00
2,756.00	
250.00	700.00
3,400.00	500.00
2,150	297.50
1,500.00	416.02
650.00	416.02
300.00	5,500.00
1,000.00	5,000.00
1,167.00	1,250.00

6,000.00	1,250.00
10,000.00	1,000.00
10,000.00	1,960.00
400.00	435.00
680.48	1,743.00
711.02	350.00
3,1667.08	510.00
3,167.09	300.00
3,567.50	
5,123.07	191,438.69*
1,000.00	134,500.00
2,000.00	110,000.00
400.00	
300.00	435,938.69
2,000.00	88,000.00
	<hr/>
900.00	523,938.69
510.65	
3,520.00	
3,550.00	
350.00	
300.00	
600.00*	*Undecipherable, H. M. D., Clk.
117.45	
101.43	
3,000.00	
366.68	
245.68	
246.26	
5,150.00	
5,000.00	
5,000.00	
5,000.00	
2,500.00	
569.87	

Plaintiff objected during the reading of the foregoing deposition to that part thereof just preceding the words: "Is there any physical connection between them?" as irrelevant and incompetent. The objection was overruled "for the present." (Sten. rep. p. 8). One of plaintiff's counsel insisted on all the exhibits to the deposition being read and the other one objected to their being read, as they tended only, in his opinion, to disprove a fact admitted by the stipulation. The objection was overruled, (sten. rep. p. 8).

Plaintiff's counsel objected to the reading of exhibit No. 10 to Stalling's deposition as irrelevant and incompetent, which objection was sustained (sten. rep. 10 to 13).

Plaintiff's counsel also objected to that part of Stalling's deposition which proved the items of commercial paper, amounting to about \$129,000.00, which turned over by R. H. Plant or I. C. Plant's Son's bank to make good his clearing house balance, said objection being upon the ground that none of these items except the check for \$3,000.00 in question in this suit had any connection with the suit. The objection was sustained. (sten. rep. p. 14). Subsequently, however, the court changed this ruling so far as to admit in evidence that part of the testimony of witness relating to the commercial paper of those concerns that Mr. Plant was shown to be connected with. (sten. rep. 14).

Plaintiff's counsel also objected to the whole deposition, which objection was overruled. (sten. rep. 14). Plaintiff then objected to the reading of the clearing house sheets exhibited to the deposition, which objection was overruled. (sten. rep. 14 & 16).

Defendant's counsel then read the deposition of Luther Williams, which is as follows: (The deposition of Luther Williams, exhibit 3 to bill of exceptions, follows in this transcript that of Stallings, and begins on page 17 hereof—H. M. D. Clk.).

Plaintiff's counsel objected to the question asking the witness as to his resignation of the position of cashier. The objection was overruled. (sten. rep. 17).

Defendant's counsel also read in evidence the deposition of J. M. Talley, which is as follows: (The deposition of J. M. Talley is on page 21 et seq hereof—H. M. D. Clk.).

Defendant's counsel then read in evidence the deposition of Richard S. Findlay, which is as follows: (The deposition of Richard S. Findlay is on page 23 et seq. hereof—H. M. D. Clk.).

Plaintiff's counsel objected to all that testimony of said Findlay as incompetent and irrelevant. The objection was overruled. (sten. rep. 18). Plaintiff's counsel then read his cross-examination.

Defendant's counsel then offered in evidence, by agreement, copies of the opinion of the Supreme Court of Georgia, of the Georgia Code, which are as follows:

The Georgia Seed Co. et al, v. Talmadge & Co.

96 Ga., 254-259.

1. Where a bank, having money on deposit with another, failed in business and became insolvent, being at the time indebted to the depositary upon promissory notes, the sum total of which exceeded the amount of the deposit, it was the right of the depositary, by way of equitable set-off, to appropriate the money on deposit, as far as it would

go, to the satisfaction of such notes, although they had not yet become due.

2. In such case, ordinary checks payable to the order of named persons, drawn upon the depositary by the first bank before its failure, but not made payable specifically out of the fund on deposit, were neither assignments nor appropriations pro tanto of that fund, so as to bind the drawee to pay the same notwithstanding the drawer's failure.

3. It was the right of the depositary, after crediting the deposit upon the notes it held against the failing bank, to share upon the balance still due, pro rata with the depositors of that bank, in a general distribution of its assets in the hands of a receiver who had been appointed to take charge of and administer the same.

May 15, 1895. Brought forward from the last term.

Interventions. Before Judge Griggs. Bibb Superior Court, November term, 1893.

Nottingham & Brunson, for plaintiffs in error.

Dessau & Hodges and C. L. Bartlett, contra.

Lumpkin, Justice.

The Capital City Bank of Macon failed, and its assets were placed in the hands of a receiver. Before the failure occurred, this bank had dealt extensively with Talmadge & Co., a banking firm of New York City. At the time of the failure, the Macon bank was indebted to the New York bankers a considerable sum upon promissory notes, which had not then matured and were partly secured by collaterals. The Macon bank also had to its credit with these bankers, on open account, a considerable sum of money, but less in amount than the aggregate of the notes. Before the failure, this bank had drawn upon the New York bankers a number of ordinary checks, payable to the order of named persons. These checks were general in their nature, and not made payable specifically out of the fund on deposit to the credit of the drawer, or any other particular fund. After the failure of the Macon bank, these checks were presented to the drawees, who declined to pay the same, but on the contrary, appropriated the entire fund on deposit with them, as far as it would go, to the payment of the notes they held upon the Macon bank, although the notes had not yet become due. Talmadge & Co. accounted fully for all collections made by them upon the collaterals above mentioned, and in their intervention filed in the present case, offered to surrender to the receiver the collaterals upon which they had been unable to realize. After allowing full credit for all the amount they had received, there still remained a large balance in favor of Tal-

madge & Co., upon their notes against the Macon bank, and they prayed to be allowed to share pro rata upon this balance with the depositors of the Macon bank on the distribution of its assets by the receiver. At the trial in the court below the case turned upon three questions, which will now be briefly stated and discussed.

1. Was it the right of Talmadge & Co. to appropriate the money of the Macon bank on deposit with them, and credit the same upon the notes they held against that bank before their maturity? The doctrine is thus stated in *Waterman on Set-Off* (2d ed.) Sec. 432: "It is deducible from the general scope of the authorities, that insolvency has long been recognized as a distinct equitable ground of set-off." The cases there cited abundantly support the text.

In *Fidelity Trust & Safety Vault Co. v. Merchants National Bank* (Ky.) 9 L. R. A., 108, it was held that a bank could set off deposits made by one who subsequently made an assignment for the benefit of creditors, against a debt owing to it by the insolvent, but which had not matured at the time of the assignment. The opinion of Holt, J., in that case though short, is strong and pointed, and well sustains the conclusion announced.

The same rule is laid down in *Nashville Trust Co. v. Fourth National Bank of Nashville* (Tenn.), 15 L. R. A., 710, in which case it was decided that insolvency is of itself a sufficient ground for the application of equitable set-off, even where the indebtedness on one side is not due; and that it is immaterial in which party's favor is the unmatured debt. The question is very fully discussed by Pitts, Special Judge, and the correctness of the decision rendered is amply sustained by numerous and most respectable authorities, among them the case of *Jones v. Robinson*, rec'r. 26 Barb. 310, which is itself a well reasoned case, and exactly in point.

The doctrine above announced is also recognized in *Schuler v. Israel*, 120 U. S. 506. It would be easy to cite numerous other authorities to the same effect, but we deem it unnecessary. The strong natural justice of the rule stated in the first head-note is so obvious as to almost, if not entirely, carry conviction of its correctness by its mere statement; and there can be little or no doubt that this one of the many instances in which the law and justice coincide to bring about the right result.

2. The next of the questions above referred to was: Did the fact that the Macon bank, before its failure, had drawn checks upon its New York correspondents, bind the latter to pay these checks notwithstanding the drawer's failure?

In that thorough and most admirable work, the American & English Encyclopedia of Law (Vol. 3, p. 226) under the title "Checks," it is stated that there is a conflict of authority whether a check holder may sue a bank upon its refusal to pay a check, the bank having at the time sufficient funds of the drawer for this purpose; but that the weight of authority seems to be against the check-holder's right of action.

In the *Bank of the Republic v. Millard*, 77 U. S. 152, it was held that the holder of a bank check could not sue the bank for refusing payment, in the absence of proof that the check was accepted by the bank, or the amount of it charged to the drawer. To the same effect is the case of *National Bank of Washington v. Whitman*, 94 U. S. 343.

It was insisted, however, in the present case, that the checks in question were really assignments or appropriations pro tanto of the funds in the hands of Talmadge & Co., and therefore operated to pass the title to the money into the payee of the checks, and to make it lawfully binding on Talmadge & Co. to pay the same, notwithstanding the drawer's failure while heavily indebted to them, and the loss they would consequently sustain in parting with the money in settlement of the checks. As already stated, these checks were not made payable specifically out of the fund on deposit with Talmadge & Co., nor out of any other particular fund. They were simply ordinary checks, drawn in the usual form and payable generally to the order of the persons therein named.

This court, in *Baer v. English & Co.*, 84 Ga., 403, has settled the law that a check of this kind, while unaccepted, does not operate as an assignment, legal or equitable, of a debt due by account from the drawee to the drawer thereof; and the decision just cited, as will be seen by reference to the opinion of Chief Justice Bleckley, is fully sustained by numerous authorities. See also *Haas v. Old National Bank*, 91 Ga. 307, and *Jones v. Glover*, 93 Ga. 484. In the former of the two cases last cited it was held that under the particular facts appearing, a jury could legally have inferred an intention to make an equitable assignment in favor of the bank to whose cashier the bill of exchange was made payable; but it was distinctly said, that had there been nothing more to indicate such intention than the mere drawing, delivery and discounting of the bill, no assignment, legal or equitable, of the fund in the hands of the drawee would have resulted. In the present case, no more was done than just above indicated; and consequently, the checks referred to were neither assign-

ments nor appropriations of the fund in the hands of Talmadge & Co.

3. The remaining question was: Did Talmadge & Co., under the facts stated, have the right to share *pro rata* upon the balance due them by the Macon bank, with the depositors of that bank in the distribution of its assets in the hands of the receiver? We think they did. They were, as to this balance, creditors of the Macon bank upon a claim evidenced by promissory notes. In *Belcher v. Willcox*, 40 Ga. 391, the rule was laid down, that when a bank is insolvent, distribution of its assets in the hands of a receiver is to be made in the same order as prescribed in the case of administration, to the extent applicable, except when preference or postponement is provided by law. And in *Ricks v. Broyles*, rec'r, 78 Ga. 610, it was held that a general deposit of money in a bank was a mere loan, and transformed the funds from ready money into a chose in action. In view of these decisions, we see no reason why the claim of Talmadge & Co. for the balance due upon the notes they held against the Macon bank, was not of at least equal dignity with the claims of the depositors of that bank, and we are not aware of any law giving the latter any preference or priority over promissory note creditors.

It seems clear therefore, that the court below was right in holding that Talmadge & Co. were entitled to prorate with these depositors in the distribution by the receiver of the bank's assets.

Judgment Affirmed.

Georgia—Bibb County.

I, Annie Blount, do certify that the foregoing five pages is an exact copy of the report of said above named case as contained and reported in the 96 Ga. 254-259; the said transcript having been made from said Reports and verified by me.

Annie Blount.

This July 22nd, 1908.

Weaver v. Nixon & Webster.

69 Ga., 699-702.

1. An exception to the charge as a whole cannot be considered, unless the whole charge is error.

2. A bill, acceptance or promissory note, either of the debtor or of a third person, is no payment or extinguishment of the original demand, unless it is expressly agreed to receive it as payment. Therefore, where a debtor caused a bank, as his agent, to transmit to his creditors a draft of such bank on a New York bank, which was without delay forwarded to New York for collection, but was protested, and the drawing bank failed, such draft did not

extinguish the original debt, although on its receipt the creditors forwarded to the debtor the account marked, "pd April 8, 1881," and signed by them.

Jackson, C. J., concurred specially.

November 21, 1882.

Practice in Supreme Court. Contracts. Debtor and Creditor. Before Judge Stewart. Upson Superior Court. July term, 1882.

Reported in the decision.

J. A. Cotton, for plaintiff in error.

A. A. Murphy; Allen & Tisinger, for defendants.

Speer, Justice.

Nixon & Webster brought their suit on a balance claimed to be due by Weaver on an account for merchandise.

Plea of payment was made. Under the evidence and charge of the court, the jury found for plaintiffs the amount claimed. Defendant made a motion for new trial, which was overruled, and defendant excepted.

1. The ground in the exception excepting to the charge of the court as a whole, cannot be considered, unless the whole charge is error, 57 Ga. 50, 87, 450; 60 ib., 78, 82, 107; 61 ib., 253.

2. Was the verdict contrary to law or contrary to evidence? The evidence disclosed the following facts: That the defendant was indebted to the plaintiffs below a balance due of \$470.77 for goods furnished. The plaintiffs were residents of Chattanooga, Tennessee; for the purpose of settling said balance, the defendant, who lived at Thomaston, Georgia, through the Citizens Bank of Atlanta, transmitted to plaintiffs a bill of exchange drawn by said Citizens Bank on the Mercantile National Bank of New York in favor of plaintiffs, for the amount of said balance due; said bill being drawn on the 7th of April, 1881; that on the 8th day of April, 1881, the same was received at Chattanooga, and the same day it was forwarded to New York for collection, and was presented for payment on the 12th of April, 1881, and protested for non-payment. On the reception of the bill by the plaintiffs at Chattanooga, on the 8th of April, 1881, they forwarded the account to the defendant, marked "pd. April 8th, 1881," and signed by plaintiffs. The Citizens' Bank failed on the 12th of April, the day the bill was dishonored when presented in New York.

The question presented under these facts is, whether the receiving of the bill by the plaintiffs, and transmitting the account to the defendant, marking the same paid, and

signing the same was a payment of said account under the law.

We understand the rule to be well settled that a bill, acceptance or promissory note, either of the debtor or of a third person, is no payment or extinguishment of the original demand, unless it is expressly agreed to receive it as payment. 9 Ga. 240, and authorities there cited. In looking carefully through this record, we find no evidence that these parties expressly agreed to receive this bill of exchange purchased by defendant of the Citizens' Bank of Atlanta, and forwarded by it to the plaintiffs, in payment of said debt. It is true, the defendant testified it was his intention, by transmitting said bill, to pay said account with it, but it nowhere appears that both parties so expressly agreed or understood it to be a payment and discharge of the debt.

The defendant selected the Citizens Bank, so far as the record shows, without the knowledge or consent of the plaintiffs at the time, to make this payment for him, and as his agent the bank remitted its bill on New York for that purpose, but when it was sought to collect the same, it was dishonored. If, by reason of the insolvency of the agent defendant had selected to meet this account, a failure occurred, then the principal of such agent who thus fails must bear the consequences of such failure, in the absence of any express agreement to the contrary, provided due diligence is shown in presenting the bill for payment. One simple contract does not necessarily merge or extinguish another; the circumstance of the note or bill being given by an agent of the principal debtor cannot vary the question. If the written promise of the principal debtor, in the absence of an express agreement, does not discharge the original debt, a fortiori the note of the agent can have no higher efficacy.

In the absence of all proof, then, of an express agreement by the parties to the original contract that the bill of exchange drawn by the Citizens' Bank of Atlanta, on the Mercantile Bank of New York was delivered and received in payment or extinguishment of this debt sued on, we are constrained to hold that the original debt was not extinguished, and that the verdict of the jury, both on law and facts was right.

Judgment affirmed.

Jackson, Chief Justice, concurring.

The agreement of the parties to settle the original debt may be gathered from circumstances and the whole case turns on their intention to settle. The debtor in this case intended to settle; the creditors also intended to do so,

if they got their money by the draft on New York. But they did not get their money and by no fault of theirs. They sent the draft on immediately; it was presented without delay and dishonored. Therefore, their intention was baffled by the failure of the bank. They never intended to settle the debt except they got the money on the draft. If they had delayed to send it, or had been guilty of laches, they would have lost; as they were not, the loss is with the debtor.

Georgia—Bibb County.

I, Annie Blount, do certify that the foregoing three and a portion of a page, is an exact copy of the report of said above named case as contained and reported in 69 Ga. 699-702; the said transcript having been made from said reports and verified by me.

Annie Blount.

This July 8, 1908.

Revierre v. Chambliss, Administrator, et al.

120 Ga. 714-717.

An unaccepted check, drawn in the ordinary form, not describing any particular fund or using words of transfer of the whole or part of any amount standing to the credit of the drawer, does not amount to an assignment at law or in equity of the money to the credit of the drawer.

Argued June 18,—decided July 14, 1904.

Exceptions to auditor's report. Before Judge Littlejohn, Sumter Superior Court. June 10, 1902.

Cited by counsel, in addition to cases cited in the opinion: Civil Code, sec. 3676; Ga. R. 29-361; 78-610, 614; 91-207; 96-815; 2 Am. & Eng. Enc. L. (2d ed.) 1030, 1002, 1065-6, 1072; 35 Mich. 201 (54 Am. R. 263-5); 71 N. Y. 225 (57 Am. R. 55); 81 N. Y. 454 (57 Am. R. 515); 6 N. Y. 412 (57 Am. D. 464); 3 N. Y. 225; 20 Mo. 577 (54 Am. D. 200-12); 14 Wall. 69-84; 124 U. S. 385; 3 Wheat. 277; 10 Wall. 152-8; 124 U. S. 385-91; 17 Blatch. 318 (Fed. Cas. 12062); 20 Fed. 900-905; 1 Pom. Eq. Jur. sec. 160.

Allen, Fort & Son, for plaintiff in error.

Erwin & Calaway, contra.

Evans, J. W. H. Simmons operated a private bank, using the business name of the Peoples Bank. He did business with a New York bank, and gave to the plaintiff in error a check on his New York correspondent. The drawer had on deposit when he gave this check funds sufficient to meet this and all other outstanding checks on the same bank. Before the check was presented to the drawee for payment, Simmons made an assignment, and subsequently, on application of certain of his creditors, all of his assets were placed in the hands of a receiver. The various issues

of fact and law involved in the petition for receiver, etc., were referred to an auditor. In his report the auditor found that the check drawn by Simmons in favor of plaintiff in error on the New York Bank was given partly in payment of wages due by Simmons and partly in payment of a deposit of funds belonging to a military company but deposited in the name of the plaintiff in error; that the plaintiff in error demanded the cash, but accepted a check on the New York bank for the convenience of Simmons. The check was issued the day before the bank failed; and when it was presented to the drawee payment was refused. Upon this finding of fact the auditor found as a matter of law that the drawing of the bill of exchange or check was neither a legal nor an equitable assignment of the funds on deposit in the New York bank, as the drawee had never accepted the check. To this finding of the auditor the plaintiff in error filed his exception of law, contending that under the facts reported by the auditor the issuance of the check on the New York bank by Simmons before his suspension was an assignment pro tanto of the fund which he had on deposit with the New York bank. The exceptions of law were overruled by the judge, and the report of the auditor sustained, and a decree was entered accordingly. Plaintiff in error excepts to the order overruling his exceptions and sustaining the auditor's report.

An unaccepted check drawn in the ordinary form, not describing particular fund or using words to indicate a transfer of the whole or of any part of an amount standing to the credit of the drawer, does not amount to an assignment of the money to the credit of the drawer. *Georgia Seed Co. v. Talmadge*, 96 Ga. 255; *Baer v. English*, 84 Ga. 403. Notwithstanding the drawer has given a check of this character, the payee could have no right of action against the drawee until acceptance. There is no privity of contract between the payee and the person on whom the check is drawn. If a check drawn generally on funds of the drawer would operate to assign so much of the fund as might be necessary to pay the check, then the priority of the checks would depend on their date. The drawee could only pay at his peril, assuming the risk when a check was presented that the drawer had not previously drawn on him. The creditor has no right to split a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. When one undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons.

This is the main reason for the rule which obtains generally, that an order drawn either on a general or a particular fund, for a part only, does not amount to an assignment of that part, as against the drawee, unless he consent to the appropriation by an express or implied acceptance of the draft. *Mandeville v. Welch*, 14 Wheat. 288; 1 Am. & Eng. Enc. L. (1st ed.) 836, and cit.

It is contended that while the transaction set out in the record may not amount to a legal assignment pro tanto of the fund in the hands of drawee, still these special facts would have the effect of an equitable assignment of so much of the fund as may be necessary to pay the check. In support of this contention the cases of *Jones v. Glover*, 93 Ga. 484, *Fidelity Co. v. Exchange Bank*, 100 Ga. 622, and *Walton v. Horkan*, 112 Ga. 814, are cited. The court in *Jones v. Glover*, said: "In order to infer an equitable assignment, such facts or circumstances must appear as would not only raise an equity between the assignor and assignee, but show that the parties contemplated an immediate change of ownership with respect to the particular fund in question; not a change of ownership when the fund should be collected or realized, but at the time of the transaction relied on to constitute the assignment." The same principle was recognized and applied in the other cases. An agreement to pay out a particular fund, however clear in its terms, is not an equitable assignment. The crucial test is that the assigner must not retain any control over the fund,—any authority to collect, or any power of revocation. The transfer must be of such character that the holder of the fund can safely pay, and is compellable to do so, though forbidden by the assignor. *Christmas v. Russell*, 81 U. S. 84. The payee was an employe of the drawer, and the draft was given to the payee for his wages and in payment of a deposit account in his name. The check was accepted in lieu of the money, for the accommodation of the drawer. Nothing was said or done to indicate that a sufficiency of any particular fund on deposit with the drawee was to be assigned to the payee. The transaction as reported by the auditor was the simple payment of a debt with a check; and the giving of the check did not operate either as a legal or an equitable assignment of any part of the fund which the drawer had to his credit with the bank on which the check was drawn. We approve and affirm the judgment of the court that the transaction under review did not amount to an equitable assignment of any portion of the drawer's deposit with the drawee.

Judgment affirmed.

All the Justices concur.

Georgia—Bibb County.

I, Annie Blount, do certify that the foregoing 3 1-2 pages is an exact copy of the report of said above named case as contained and reported in the 120 Ga. 714-717; the said transcript having been made from said reports and verified by me.

Annie Blount.

This July 22nd, 1908.

Sec. 3720 (2867). Bank-bills, checks and notes, payment in. Bank-bills, if received in payment, are warranted by the payer to be genuine, and that as far as he knows the bank is solvent. Bank-checks and promissory notes are not payment until themselves paid.

Note, etc., not payment unless accepted as such: 9 Ga. 223, 240.

Promissory notes payment when so understood by the parties: 4 Ga. 182.

By act of 1832, paper discounted and held by bank payable in its bills: 24 Ga. 249. Presumption as to note being received in payment: 31 Ga. 564. Check payment, when itself paid: 58 Ga. 258.

See general note hereafter.

Generally not payment until themselves paid: 77 Ga. 463.

State treasury notes given for comptroller-general's salary, held payment of salary: 66 Ga. 673.

Note is not payment unless so agreed: 70 Ga. 595.

Drafts not payment until paid, unless expressly taken so: 92 Ga. 512.

Notes, etc., considered payment if so agreed; without agreement, note not made indebtedness by account, by memorandum on books: 75 Ga. 729.

The real question is, what was the intention of parties? Parol admissible to show note was not taken in payment, if writings are doubtful: 71 Ga. 450.

Plea of payment supported by parol evidence that notes given and accepted in payment: 93 Ga. 717.

Bank transmitting its New York draft for debtor to his creditor, draft protested and drawing bank failing, debt not paid although creditor forwarded account marked paid, etc.: 69 Ga. 699-700.

One selling goods to agent for principal, and taking agent's note, principal liable on original consideration: 69 Ga. 703.

All from 4th section to this point, excepted to as incompetent, irrelevant and illegal.—In pencil in the margin. Clk.

N. P. Lesueur.

If A gives his note in liquidation of account of C it is not, without other proof, such payment that original debt cannot be resorted to: 6 Ga. 166.

Laborer's lien not defeated by giving him negotiable draft which he negotiates, when: 91 Ga. 651.
Georgia—Bibb County.

I, Annie Blount, do hereby certify that the foregoing is an exact transcript of section 3720 of the Code of Georgia of 1895; the said transcript having been made and verified by me.

Annie Blount.

This July 22nd, 1908.

A debtor may prefer one creditor to another and to that end he may bona fide give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer choses in action as collateral security, the surplus in such case not being reserved for his own benefit.

Code of Ga., 1895; secs. 2699.

Transfer, etc., when fraudulent. All conveyances, assignments, transfers of stock, or other contracts made by bank in contemplation of insolvency, or after insolvency, except for the benefit of all creditors, and stockholders, shall be fraudulent and void, unless made to an innocent purchaser for value without notice or knowledge of the condition of the bank; and its officers making or consenting to such conveyances or contracts shall be punished as provided in the penal code." Code of Ga., 1895, Sec. 1979 (4429).

It is hereby agreed that the foregoing papers, purporting to be copies of the opinions of the Supreme Court of Georgia in the cases of the Geo. See Co. v. Talmadge, Weaver v. Dixon & Webster, and Revierre v. Chambliss, Adr., and also the papers purporting to be copies of sections of 3720 and notes 2697 and 1979 are true copies of what they purport to be and that they may be read in evidence on the trial of the case of Miller, Agent v. American National Bank, in U. S. Court, Nashville, Tenn., by either party, all exceptions for irrelevancy or incompetency of the subject-matter being reserved. Sept 26, 1908.

John M. Gaut, Atty. for American National Bank.
Baxters, Attorneys for Miller, Agent.

Filed Oct. 1, 1908. H. M. Doak, Clerk.

Defendant's counsel then introduced as a witness N. P. Lesueur, who testified as follows:

N. P. Lesueur, called on behalf of defendant, being duly sworn, testified as follows:

Direct examination by Mr. Gaut for defendant:

N. P. Lesueur.

Q. Please state what official connection you sustained to the American National Bank during the month of May, 1904?

A. I was cashier.

Q. You had been cashier some time before, had you?

A. Yes.

Q. And have continued down to the present?

A. Yes.

Q. State whether or not, on Monday, the 16th day of May, you knew anything of the insolvency of R. H. Plant, of Macon, Georgia, or of the suspensy and insolvency of his bank, or the filing of a petition in bankruptcy against R. H. Plant?

A. No, sir; I did not.

Q. You had no knowledge of any of those things on the 16th day of May?

A. No, sir.

Q. Did you or not suppose Mr. Plant was going on with his business as he had formerly done?

A. I did.

Q. Did you or not suppose that his bank was going on in business as it had formerly done?

A. Yes.

Q. And you knew nothing of any steps to put him in bankruptcy?

A. No, sir.

Q. State whether or not at that time Mr. R. H. Plant was indebted to the American National Bank and how much?

A. Yes, sir; fifty thousand dollars.

The Court: I think that is conceded, and that it was a debt that had not matured.

Mr. Gaut: I am not sure whether the stipulation states the amount of the debt or not.

The Court: It was agreed that it was \$50,000.00.

Mr. Gaut:

Q. Mr. Lesueur, state whether or not there was any one connected with the American National Bank besides yourself and Mr. W. W. Berry who would have received notice of those things if any one had come to the bank, or who would have been authorized to act on such notice if it had come?

A. No one at all.

Q. No one but you and Mr. Berry?

A. No, sir.

Cross-examination by Mr. Andrews for the plaintiff:

N. P. Lesueur.

Q. Mr. Lesueur, what were your duties as cashier of the American National Bank?

A. Well, the duties of the cashier of the American National Bank are like the duties of any other cashier of any other bank?

Q. What are your duties as cashier?

A. Well, it is hard to tell, virtually running the bank, principally.

Q. Have you no routine business to go through with during the day?

A. No, sir; no routine business.

Q. Have you no authority that is defined at all?

A. Yes, lots of authority.

Q. What is your authority?

A. Well, it is passing upon loans, one thing, and passing on checks, and just running the bank, like running any other business.

Q. Did you pass on this \$3000 check when it came in?

A. Did I pass on it? No, sir.

Q. When did you first hear of Mr. Plant's insolvency and bankruptcy?

A. I don't remember, I don't remember the date.

Q. Wasn't it a matter that concerned your bank, his insolvency and bankruptcy?

A. Wasn't it what?

Q. Wasn't it a matter of a great deal of concern to your bank?

A. Yes, certainly it was.

Q. It involved a loss of something over twenty thousand dollars to your bank, didn't it?

A. I couldn't tell you that.

Q. You had a claim of fifty thousand dollars against that estate, did you not?

A. Yes.

Q. You filed that in bankruptcy, did you not?

A. I don't remember whether we did or not; I suppose we did.

Q. How much of it did you file in bankruptcy?

A. I couldn't tell you.

Q. Well, who attended to that business for you?

A. Well, our lawyers; we generally turn it over to our lawyers and they do it—our legal department.

Q. Who were your lawyers at that time?

A. Messrs. Gaut and Pilcher.

Q. Have you records that would show how much of that claim was filed in bankruptcy?

A. I think we have, yes, sir.

N. P. Lesueur.

Q. Will you file that as an exhibit to your deposition?

A. All right, sir.

Q. You read the papers, do you not?

A. Yes, sir; sometimes, when I have time.

Q. Do you remember when you first saw in the papers that Mr. Plant had committed suicide?

A. No, sir; I don't remember the date.

Q. You don't remember whether it came out in the Banner that afternoon?

A. No, sir; I do not; I don't remember whether it did or not.

Q. Do you or not take a banking journal?

A. Yes, sir; several of them.

Q. Which shows the financial condition of the different banks over the country?

A. Oh, yes.

Q. How often is that issued, Mr. Lesueur?

A. Some of them are issued monthly and some weekly.

Q. Do you take any that are issued daily?

A. There is no banking journal that is issued daily that I know of.

Q. Isn't there a bank statement of the condition of the banks that reports failures over the country every day?

A. No, sir; not that I know of.

Q. Did you use Dun's or Bradstreet's Agency to report to you failures over the country and banking conditions?

A. They may be turned in there; but they are not regular with us; sometimes we get them and sometimes we do not.

Q. As a regular thing, don't you get those reports every day, all failures over the country?

A. No, sir; I don't know that I have seen one in six months.

Q. Upon what do you depend to find out the failures of your correspondents in the banking business?

A. Well, we have no particular source of dependence; we often see it through the papers and sometimes through our other correspondents; we generally get the information, even if it is very late. We come to the—

Q. After a while?

A. After a while, Yes, there are several avenues by which we get that information.

Q. You don't make any special effort to get the information at once?

A. No, we have no reason; if we hear it, that settles it; there is no special reason why we should get it after we have already received it.

N. P. Lesueur.

B. W. Nowlin.

Q. I mean you make no special effort to get the information soon after the occurrence?

A. No, we cannot tell when the occurrence takes place; if we know when the occurrence was going to happen, we would try to get all the information possible; and, if they owed us anything, we would secure our debt.

Q. You make no effort to learn of these failures when they occur?

A. No, sir; there is no reason why; we would not know which way to turn to get information of that kind.

Q. Did you pass on this fifty thousand dollars indebtedness that Plant owed your bank?

A. Yes, sir.

Q. You accepted his endorsement as perfectly good, did you not?

A. Yes, sir.

Q. Did you investigate his commercial standing at Macon before you took those drafts?

A. Yes, we investigated it.

Q. You found it to be the best to be found in that part of the country, did you not?

A. Yes, sir.

Re-direct examination by Mr. Gaut for defendant:

Q. I will ask you, Mr. Lesueur, if it wasn't four or five days after the sixteenth of May that Mr. Plant shot himself?

A. I don't remember; I couldn't give you that information without posting myself.

Q. You did get the information?

A. Yes, sir.

Further this deponent saith not.

B. W. Nowlin was then introduced as a witness on behalf of the defendant and testified as follows:

B. W. Nowlin, next called in behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Gaut for defendant:

Q. Mr. Nowlin, state what business relation you sustained to the American National Bank, in the months of April, May and June, say, 1904?

A. I was general bookkeeper.

Q. I want you to state when the \$3000 check in question in this suit was received by the American National Bank?

A. It was received on Monday, May 16th.

Q. State what time during the day that check was credited to the First National Bank?

B. W. Nowlin.

A. It was credited some time between 10:30 and the closing of the bank—possibly about 11 o'clock; may be 11 o'clock, may be later.

Q. What time did the bank close on Monday?

A. Two o'clock.

Q. That is the time you say it was credited to the First National Bank?

A. Yes, sir.

Q. You say it was between half past ten and the close of the bank?

A. Yes, sir.

Q. What did you say about 11 o'clock?

A. I said possibly about 11 o'clock, as a usual time about 11, although some days it is later.

Q. You have, do you not, a double mail on Monday?

A. Yes, sir.

Q. Being following Sunday?

A. Yes, sir.

Q. Does, or not, that fact have anything to do with the dispatch of the business on that day as compared to other days?

A. Yes, sir.

Q. Well, what?

A. It makes it later; we have more work to do.

Q. State about what time was it charged to Mr. Plant on his account?

A. Some time after three o'clock; from 3:30 to 5 o'clock, I couldn't tell exactly when.

Q. Somewhere from 3:30 to 5 o'clock?

A. Yes, sir.

Q. State if a letter of advice was written that day, informing the First National Bank that the check had been credited; state by what mail that letter would go off?

A. It would go off in the regular mail of the bank, which leaves there some time after four o'clock, sometimes as late as seven o'clock.

Q. It leaves the bank at that time?

A. Yes, sir.

Q. What time does the mail leave?—the train?

A. I couldn't tell you exactly what time the train leaves; it should go off on the night train, it looks to me like.

Q. State exactly what day, if you know, these charges on the books were charged? That is to say, on what day this check was credited to Mr. Plant and charged back to the First National Bank?

A. On May 25th, 1904.

B. W. Nowlin.

Q. Did you get that date from your books?

A. Yes, sir.

Q. Was, or not, the First National Bank advised of that fact?

A. The receiver of the First National Bank was.

Q. And state whether or not that check was returned to the First National Bank?

A. I don't remember now; but from the usual custom it would be returned to the First National Bank, when it was charged to their account and the advice of the charge.

Q. That was the—

A. That was the usual custom.

Q. The usual custom of the bank?

A. Yes, sir.

Q. Do you know, as a fact, whether or not the American National Bank has it?

A. I don't think it has. I haven't seen the check for a long time.

Q. You would have no use for the check when you had charged it back to the party depositing it?

A. No, sir.

Q. Do you know whether or not Mr. R. H. Plant was President of the First National Bank of Macon?

A. My impression is now that he was President, his name was on the letter head as President.

Cross-examination by Mr. Andrews for plaintiff:

Q. You testified, Mr. Nowlin, that the check was received on Monday morning; can you state at what time in the morning you received that check?

A. The mail is brought from the postoffice by one of the boys between seven and eight o'clock.

Q. What was done with the mail when it was received by your bank that morning?

A. The mail is first opened and laid on the cashier's desk.

Q. Along about what time?

A. About 8 o'clock. They begin opening it about 8 o'clock. He glances through it to see, principally, what comes in and hands it to another clerk.

Q. Ho sorts it out, does he not?

A. No, sir; he doesn't; he glances through it to get an idea of what is passing through the bank each day.

Q. To make himself familiar with what is going on?

A. With what is going on, yes.

Q. If he finds a check there that for any reason he does not wish the bank to pay, isn't it part of his duty as cashier to note that at once and inform the clerk of that matter?

B. W. Nowlin.

A. Of course, if it was a check he didn't want paid, he would notify us.

Q. It is his duty to look out for checks he doesn't want paid?

A. No, sir; those checks usually go up to the bookkeeper, and checks that are not good are referred back to him; he does not scrutinize the checks as they pass through.

Q. About what time had those checks reached the bookkeeper?

A. They reached the bookkeeper somewhere between 11 and 2 o'clock.

Q. Didn't you testify that it would be credited between 10 and 11?

A. It would be credited through the bank, yes.

Q. Who credits them?

A. The general bookkeeper.

Q. Well, it would reach the bookkeeper and be credited, then reach the individual bookkeeper then between 10 and 11.

A. No, sir; it has to go through the teller to get to the individual bookkeeper.

Q. What time does it reach the teller?

A. It would come up to the teller usually about half past ten o'clock, between ten and half past.

Q. If I am not mistaken, you testified that this check would be credited between ten and eleven some time?

A. It is credited back to the bank, that is two different departments, the general books are run by the general bookkeeper.

Q. That is, credited to the First National Bank of Macon?

A. Yes, sir; to the First National Bank of Macon.

Q. That is the only party you have to credit it to?

A. Yes, that is a credit.

Q. The other entry is a debit?

A. Yes, the other entry is a debit.

Q. Then it is credited some time, you say, between ten and eleven?

A. It is like I said, possibly between ten and eleven and two o'clock, we cannot tell exactly when.

Q. Then it must reach the bookkeeper to be credited?

A. No, sir; not necessarily.

Q. Whose duty is it to credit the check?

A. It is the bookkeeper's duty to credit it.

Q. Then it cannot be credited before it reaches him?

B. W. Nowlin.

A. You don't credit it from the check; you credit it from the letter of advice, or deposit ticket.

Q. Don't they come attached together?

A. They are separated by the general bookkeeper.

Q. He cannot separate them before he receives them?

A. Yes, he must receive it, the check and the letter both.

Q. Then he could have received it before ten o'clock?

A. Yes, sir.

Q. After the bookkeeper receives the check and letter and separates the two, what does he do with it?

A. He gives the teller a list of the items.

Q. What items?

A. Items that are city items on our bank and items on other banks in the city, and any collections enclosed in the letter.

Q. Then your receipts from correspondents for their credit go to him, out of town correspondents?

A. You mean the credits that they send in; the bookkeeper holds those letters and makes entries on the account.

Q. Then the general bookkeeper credits the foreign accounts?

A. Yes, sir.

Q. What does he do with them after you credit them?

A. The letter is given over to the clerk to be advised.

Q. Who looks into the state of the account, the drawer's account?

A. The bookkeeper who handles the check looks into the account.

Q. What would be the advice, then?

A. We use three kinds of advices, to advise the First National Bank of Macon.

Q. I thought you meant advice as to the standing of the drawer?

A. No, the advice to the bank at Macon that the item had been received.

Q. Then probably or possibly this letter of advice was determined upon between ten and eleven o'clock?

A. No, the letter could not get to him until after that time, for they could not be passed back to him until after eleven o'clock—they never are, until after 11 o'clock.

Q. Then what becomes of the check?

A. The general bookkeeper, he will turn the check over to the receiving teller; the endorsement will be looked into, the check to see if it is endorsed properly, the signature will be looked at by the teller to see that it is genuine, then af-

B. W. Nowlin.

W. W. Berry.

ter that the check will be turned over to the individual bookkeeper who has charge of that account, to be debited to the party who drew the check.

Q. About what time would that take place?

A. Some time after eleven o'clock, it would be turned over to the bookkeeper.

Q. When you notified the First National Bank of your action, in recharging or debiting this check, or rather charging it off your books, didn't they repudiate that transaction at once and demand payment?

A. I don't know whether they did or not.

Q. They did not accept the check, did they?

A. That would be under the hands of the cashier and I don't know whether they repudiated it or not.

Re-direct examination, by Mr. Gaut for defendant:

Q. Mr. Nowlin, you stated that the check would be turned over to the individual bookkeeper to be credited?

A. To be charged.

Q. To be charged to the drawer?

A. Yes, sir.

Q. I believe you stated that would be somewhere after ten o'clock?

A. It would be turned over to him after 11 o'clock.

Q. Then what time would the bookkeeper charge that up to the drawer?

A. It would be about half past three; after half past three.

Q. Some time after half past three?

A. Yes, sir.

Q. Now, you stated what time these letters usually reach the general bookkeeper; what would be the usual time on Monday, or any day succeeding a holiday?

A. They come to him as fast as they are opened; he doesn't dispose of any of them until all are gone over; we couldn't handle them all at once.

Q. What time would that be on Monday, or a day after a holiday?

A. A little after ten o'clock. Somewhere along about ten.

Further this deponent saith not.

Defendant's counsel also read in evidence the deposition of W. W. Berry, which is as follows:

W. W. Berry, sworn on behalf of the defendant, testified as follows:

Direct examination, by Mr. Gaut:

W. W. Berry.

Q. State what is your official business relation to the American National Bank?

A. I am president of the American National Bank.

Q. Are you one of the active managers?

A. Yes, sir.

Q. Did you sustain this relation in 1904?

A. Yes, sir.

Q. State whether or not, on the 16th day of May, 1904, you had any knowledge of the insolvency of R. H. Plant or the suspension of his bank, or of his bankruptcy?

A. I did not.

Q. Did you or not suppose him to be a solvent man?

A. Yes, sir; I did.

Q. Did you or not suppose his bank was continuing in business as it had been?

A. Yes.

Q. And you knew nothing of its suspension or of his bankruptcy?

A. No, sir.

Q. Did not learn it until after the 16th day of May?

A. Not until after that time.

Cross-examination, by Mr. Andrews, for plaintiff:

Q. Isn't it a fact that your bank received from the other banks with which you have running accounts what are known as letters of cash or cash letters?

A. They receive letters containing items and checks and on us and on other points and everywhere else, yes, sir.

Q. What are known as cash letters?

A. I suppose they would call them cash letters. There are checks from all over the country that come in, letters every day, you know.

Q. Was it not the custom of your bank at that time, or had you not, prior to that time, received from the First National Bank such letters?

A. Yes.

Q. When you received such a letter with a check in it on your own bank, did you or not mark that as cash?

A. Oh, no.

Q. When it is subject to be returned or refused only when you find that the signature of the drawer is forged or there are no deposits to pay the checks?

A. Those details of the bank are attended to by the cashier. I never pay any attention to the time the mail is opened.

Q. Don't you know, as a matter of fact, that those checks—

A. I know the letter gets in some time during the day.

W. W. Berry.

Q. Don't you mark it as cash when you received it?

A. No, sir; it is not marked cash.

Q. Don't you consider a check on your own bank from one of your correspondents as cash, subject to be refused only on the ground of the drawer's signature being found to be forged or that there are no deposits in your bank to pay the same?

A. There are a great many things that would cause checks to be thrown out, you know.

Q. Aren't those the only two items you look at when you receive a check from one of your correspondents, correspondent banks, as cash?

A. I never have anything to do with that part of it at all. That goes through the cashier. I pay no attention to the times things are credited nor look into it to see whether their balances are good, and all that sort of thing. That is entirely out of my province.

Q. Mr. Berry, didn't you acquire your knowledge of the solvency of Mr. Plant on the 16th?

A. I did not.

Q. Or 17th of May?

A. I did not on the 16th or 17th of May, I don't think.

Q. Neither day?

A. I don't think so.

Q. Do you know when you acquired that information?

A. I don't remember when it was, Mr. Andrews, I wouldn't like to make a statement.

Q. It was very soon after the bankruptcy, which was published May—

A. Yes, sir; ten days or something like that, I don't know when it was now. I don't like to make that statement for I might not be correct.

Q. You held fifty thousand dollars of his unsecured drafts?

A. No, of his paper accepted by us.

Q. By himself?

A. I. C. Plant's Sons, I believe it was.

Q. You knew that was himself?

A. Yes, sir.

Q. And that was unsecured in your bank?

A. What say?

Q. That was unsecured?

A. Yes, sir; except as Plant was concerned in his banking house, Plant's sons.

Q. That was his individual property?

A. Well, that seems so now.

W. W. Berry.

Q. You knew it at the time, didn't you, Mr. Berry, you knew it was not a corporation?

A. I knew it was run as I. C. Plant's Sons. Drafts drawn by R. H. Plant and accepted by I. C. Plant's Sons.

Q. Didn't you know that bank was his individual property?

A. I didn't know whether other people were connected with it.

Q. You knew it was a private bank?

A. I knew it was not a National bank.

Q. You knew it was not a corporation?

A. I didn't know how that was.

Q. His bankruptcy took place and you had his unsecured paper for fifty thousand dollars and you didn't know it for ten days?

A. I don't know how long it was, whether it was three or four days or ten days.

Q. Don't you think you heard of that bankruptcy within a very reasonable time after it took place—the next day, the 17th or 18th?

A. I presume so, but I don't know when, I wouldn't like to state.

Q. When would you assume that you heard of it, under those conditions?

A. I wouldn't like to assume.

Q. When do you think you heard of it?

A. That is the same question, you know. I wouldn't like to make an answer that I don't know would be correct.

Q. Mr. Berry, when checks come into your hands from the outside and they are mixed, say, with checks on your own bank, when do you divide those checks under these different heads?

A. I don't know how they divide them, I don't pay any attention to that part and have never done it.

Q. You don't know about that?

A. I don't know about that and wouldn't like to make a statement because it doesn't come under my province at all. That is handled by the general bookkeeper and cashier and those men and I don't know anything about that. I don't open the mail.

Q. When you made an investigation of this matter, did you find when this check was received by your bank first?

A. Did I find what?

Q. Did you find what hour that check was received by your bank?

A. I don't know that.

W. W. Berry.

Q. Did you find that out later, a week or two weeks after you got it?

A. I don't know that; I don't when it was received. Further this deponent saith not.

Defendant here closed its testimony.

Complainant's counsel then stated to the court that they would like to ask, before they put in any proof in rebuttal, for peremptory instructions (and that whatever proof in rebuttal was submitted for plaintiff would be subject to this motion.) Parentheses foregoing are in pencil—Clerk). The court stated that he would hear the motion, but would not act on it, and that plaintiff might introduce his rebuttal testimony and he would act on the motion as of the time it was made.

Plaintiff then offered in rebuttal and read to the jury the depositions taken on behalf of plaintiff of R. S. Finlay, Geo. H. Plant and L. T. Stallings, which depositions were, respectively, as follows:

Agreement.

It is hereby agreed that plaintiff in this action may take the depositions of R. E. Findlay, L. T. Stallings, George H. Plant and Merrill P. Callaway, at or near Macon, Ga., on the 10th day of April, 1908, and that all legal formalities relative to taking the depositions are expressly waived.

It is understood, however, that if, after said depositions are taken, defendant deems further testimony on its behalf necessary, it shall have the right to take such further testimony and shall not be precluded from continuing the case to enable it to do so, should such continuance become necessary.

Baxters,

Attorneys for Plaintiff.

John M. Gaut,

Attorney for Defendant.

United States of America, Southern District of Georgia, State of Georgia, County of Bibb, ss:

The examination of witnesses de bene esse, beginning on the 10th day of April, 1909, and continued regularly, by consent of all parties, to the 12th day of April, 1909, on which date said examination was concluded, on behalf of the plaintiff, before me, Chas. D. Cork, a notary public in and for said county of Bibb, at the office of A. L. Miller, at Macon, Georgia, in a certain suit now pending in the Circuit Court of the United States for the Middle District of Tennessee, wherein A. L. Miller, agent for the shareholders

R. E. Findlay.

of the First National Bank of Macon, Georgia, is plaintiff, and the American National Bank of Nashville, Tennessee, is defendant, R. E. Findlay, a witness produced in behalf of the plaintiff, being first duly sworn, deposes and says, as follows:

R. E. Findlay, by A. L. Miller:

Q. Will you state to the examiner how long Mr. Plant was confined to his home with illness before the bank closed?

A. I cannot state that accurately, but my recollection is that he was at home ill for at least five or six weeks, possibly more, possibly longer.

Q. Well, I. C. Plant's Son's private bank and the First National Bank of Macon closed about the same time, didn't they—a few minutes' difference?

A. Yes, sir; about a half hour's difference.

Q. During those weeks that Mr. Plant was confined at home, did he at any time come down, either to the private bank or the First National?

A. No, sir; not to my knowledge. I am sure he didn't come to the First National.

Q. Who conducted the business of I. C. Plant's Son while Mr. Plant was confined at home by sickness?

A. Mr. Hurt, the cashier.

Q. Charles D. Hurt?

A. Charles D. Hurt, the cashier.

Q. Was he the manager of that bank, anyhow?

A. Yes, sir; I should say he was.

Q. How long had he been with Mr. Plant in I. C. Plant's Son's bank—just approximately?

A. Well, I don't know that I can answer that question accurately—it seems to me though he must have been there for—up to that time for ten or twelve years at least.

Q. Who were the individuals that conducted the business of the First National Bank of Macon while Mr. Plant was confined at home?

A. There were two executive officers there.

Q. Give their names?

A. Mr. George H. Plant, vice president, and I was cashier.

Q. What position did Mr. Stallings occupy, L. T. Stallings?

A. Mr. Stallings was the bookkeeper.

Q. Mr. George Plant was the vice president and you were the cashier?

A. Yes, sir.

R. E. Findlay.

Q. And during Mr. Plant's confinement by illness at home, you two gentlemen conducted the affairs of the bank?

A. Yes, sir.

Q. Will you state, Mr. Findlay, what knowledge you had as to Mr. Plant's solvency or insolvency at the time the bank closed? Whether you knew he was solvent or insolvent?

A. Up to the time the doors of I. C. Plant's Son's Bank were closed, I considered him thoroughly solvent—I had no knowledge of any other condition.

Q. At the time the \$3,000 draft was forwarded to the Nashville bank, the defendant in this case, did you have any knowledge of his being insolvent?

A. No, sir.

Q. What was your real opinion at that time about his financial condition?

A. I considered him at that time to be a wealthy man as I had always considered him.

Q. Who handled the particular transaction of sending this draft on to Nashville?

A. That I don't know. I think that the draft in question was brought in by Mr. Hurt, together with a number of other papers and turned over either to the teller or to the bookkeeper to be credited on the clearing house balance, I think, of I. C. Plant's Son.

Q. You don't know which officer forwarded the \$3,000 draft to Nashville?

A. No, sir; I don't know that.

Q. Well, now, at the time of the \$3,000 draft transaction, what knowledge did you have of Mr. Plant's connection with the American National Bank of Nashville?

A. I knew that he was doing business with that bank, had an account with them. I didn't know and don't know yet, whether I. C. Plant's Son had an account with that bank.

Q. I am talking entirely about the First National's account there right now?

A. The American National was a correspondent of the First National, I believe, I don't know just what the status of the account was at that time between the two banks, that is which way the balance was.

Q. Going back to Mr. Plant's own account, or I. C. Plant's Son, the private bank, do you know whether at that time—did you you know whether at that time Mr. Plant was indebted to the American National Bank of Nashville, or had a balance to his credit there?

R. E. Findlay.

A. No, sir; I don't know what the status of his account was at the bank. I know Mr. R. H. Plant had an account and did business with the American National Bank of Nashville, Tennessee, but I don't know whether he had a balance there to his credit or whether he owed them, and I don't know whether I. C. Plant's Son had an account with that bank or not.

Q. So far as you know or so far as you knew at the time then, the balance with the American National Bank of Nashville, might have been in Plant's favor?

A. Yes, sir; it might have been either for or against him, I had no knowledge of that.

Cross-examination, by Mr. Callaway:

Q. I believe you testified before that you went into the First National as cashier some three or four months previous to its failure?

A. Three and half months, I went in on the first of February.

Q. Previous to that time you were cashier of Mr. Plant's other business known as the York Life Insurance Co. business?

A. Yes, sir.

Q. It was your job, after you left the New York Life office, to continue to sign checks and drafts drawn by Mr. R. H. Plant's business, by you as cashier, did you not?

A. I don't recall that I did as a general thing, when I first went over I may have still signed checks for him. I don't think that was kept up, though.

Q. Do you recall that the checks drawn by R. H. Plant amounting to a good number of thousands of dollars, that were turned over to the First National Bank, on either the 13th or 14th of May, making up the clearing house balance, were signed by you as cashier for Plant?

A. No; I don't think any of those checks were signed by me; I don't recall that they were.

Q. Look at these checks I show you, one on the National Bank of Commerce for five thousand dollars, one on the Importers & Traders National Bank of New York, for \$2,500, one on the Oriental Bank for \$1,500, one on the Importers & Traders National Bank for \$5,000, one on the Importers & Traders National Bank for \$2,000, all dated May 13, except one which you will see dated May 15, signed R. H. Plant, R. E. Findlay, cashier.

A. Yes, sir; those were; those were all signed by Mr. Plant by myself under a power of attorney I had.

Q. That American National bank draft was a companion draft, was it not, to these you are just examining—

R. E. Findlay.

they were made payable to the First National Bank, were they not, and signed by you in the same manner?

A. I don't remember seeing that particular check, it may or may not have been signed—I know I have signed checks on that bank, in fact practically all the the banks Mr. Plant did business with.

Q. These checks, aggregating some sixteen or seventeen thousand dollars were—went into the First National Bank to make up part of this same clearing house balance that is part of this general transaction?

A. They were turned over to the bank for that purpose.

Q. And were forwarded in due course by the First National Bank to these other banks for collection and payment declined.

A. They were forwarded to some of the correspondents there; I don't know who.

Q. You drew those checks under Mr. Plant's instructions?

A. I signed them; they were drawn by his bookkeeper, over at the insurance office and sent over to me to be signed when I left there was no successor appointed and during Mr. Plant's illness I signed a lot of his personal checks under a power of attorney I had.

Q. You would not have signed these checks, though, without some instructions to that effect, or in due course of your duties or business?

A. Not without his instructions.

Q. Mr. Plant was sick some thirty days, I believe you stated, previous to the failure of the bank? During that time, of course, he could not be down there at the bank, as far as his affairs in connection with that bank and the affairs of the bank were still operated through Mr. Plant—as cashier, you got instructions from Mr. Plant as to what he wanted done?

A. Well, matters like that he instructed me—if he wanted checks signed, anything of that kind, I don't know that I had any particular instructions as to matters coming out of the bank, those were his personal affairs, those checks, and they were only bank matters in this connection, that after they were signed they represented money, New York Exchange, and they were money turned over to the First National Bank by Plant's Son to be credited on that clearing house balance.

Q. In paying off part of Mr. Plant's indebtedness, of course?

A. Yes, sir.

R. E. Findlay.

Q. In signing those checks for Mr. Plant, you acted under your power of attorney as cashier of R. H. Plant, under the old relation you had with him to sign them?

A. Yes, sir.

Q. Then in receiving them, you received them as cashier of the First National Bank and credited on Mr. Plant's indebtedness?

A. If I received them personally.

Q. I mean when I say you received them that the bank received them and credited them on that indebtedness?

A. Yes, sir.

Q. You knew they were intended for the First National Bank when you made them payable to them?

A. Yes, sir.

Q. All this batch of papers were received by the First National Bank and credited to his indebtedness?

A. Yes, sir; credited on his clearing house balance.

Q. These checks were all signed by you and turned over and received by the First National Bank during Mr. Plant's illness?

A. Yes, sir.

Q. During that time he was ill, did you make any discounts of importance without consulting Mr. Plant, or did you continue the same relations you testified existed when you went in there—that is Mr. Plant told you you were to receive your instructions from him as the head of the bank?

A. Yes, sir.

Q. You continued to do that until he got sick, after he got sick he transmitted those instructions to you just as he had before?

A. Well, if there were any instructions to be given I received them from him.

Q. The management of the bank, during those thirty days, was not relinquished by Mr. Plant?

A. I don't know; I can't say that it was—he was still president of the bank, and any instructions he might send down to anybody there would be carried out.

Q. He did in fact send those instructions?

A. I suppose he did send some.

Q. Just as you got this transaction here?

A. I don't know; I can't recall any instructions about any particular matter, but perhaps there were some.

Q. Did you make any discounts during the thirty days Mr. Plant was sick of any moment or size, without advising with him, or having his advice in the matter?

R. E. Findlay.

A. Probably there may have been, but I don't think any large ones except what Hurt might bring in there, any paper that Hurt brought in and offered for discount, it was accepted and credited.

Q. The paper that was brought into the bank by Mr. Plant and accepted by him as cashier of the First National Bank, it was done under the arrangement you had with I. C. Plant's Son that you accepted whatever paper was sent in there by them?

A. Yes, sir; anything Mr. Hurt would bring in for I. C. Plant's Son was accepted.

Q. So that anything Mr. Plant sent in there was accepted by you for the First National Bank without any further question?

A. Yes, sir.

Q. Do you remember what time the doors of the First National Bank closed on Monday the 16th?

A. About 9:30 I think.

Re-direct examination by Mr. Miller:

Q. Mr. Callaway has asked you about instructions from Mr. Plant, did you have any personal, direct instructions from him about these transactions with the American National Bank of Nashville?

A. The transaction in which these checks here were made?

Q. Yes, sir.

A. No; I had no direct instructions about them, either personally or through any one else about those particular transactions.

Q. During the period of his illness the papers were in fact brought in by Charlie Hurt, were not they?

A. Yes, sir; and before his illness the papers that were discounted there were usually brought in by Mr. Hurt—sometimes I think Mr. Plant would bring them in himself, but in regard to instructions, I would like to state this, that when I went over there, there were just general instructions or perhaps you might say understanding there, that any papers that Hurt would bring in for credit or discount would be accepted, but in some cases there were notes or other papers that didn't bear Plant's endorsement, there was though an implied endorsement, it was understood he was responsible for them, and I knew he was responsible for them and took them up because paper of that character matured while I was in there and was always taken up, up to the time the bank closed.

R. E. Findlay.

Q. Previous to Mr. Plant's illness, if he were out of town, say a week, during that time Hurt still carried on the business just as you have stated it, didn't he?

A. Yes, sir.

Q. And as I understand you got no—during these weeks preceding the closing of the bank and while Plant was sick at home, you got no personal instructions from him about paper of this character?

A. No, sir.

Q. I will ask you on the particular point, did you get any instructions about the three thousand dollar transaction with the National Bank from Mr. Plant?

A. No, sir; none whatever, in that transaction I represented Mr. Plant personally, I represented not R. H. Plant, president, but R. H. Plant in signing those personal checks for him with power of attorney, but I did not represent him as president of the First National Bank in this transaction, because I had no instructions from him at all, about that particular matter. I had to get the items from him, they came from Mr. Plant through Mr. Hurt.

By Mr. Callaway:

Q. You were acting for the First National Bank when you received those checks?

A. Yes, sir.

In reading over my former testimony, I notice one or two inaccuracies, they are not material, I don't suppose. I don't suppose it is worth while to make any mention or correction of them. One of them is this, one question where I stated that Mr. Plant when I went over to the First National Bank had told me I had better not undertake to do anything at all for a while over there until I familiarized myself with things and learned the customs of the bank. In the testimony that is put down as the "custom of the bank."

By Mr. Miller:

Q. You worked for some years in the New York Life office under Mr. Plant, didn't you?

A. For ten years, yes, sir.

Q. And you were there during those years when he had Miss Morris as his private secretary?

A. Yes, sir; she was not there quite as long as I was.

Q. She was there several years?

A. Yes, sir.

Q. Will you state to the examiner whether in addition to his interests in his private bank and the First National

R. E. Findlay.

George H. Plant.

Bank, whether he carried on a business, whether large or small, outside of that connected with either bank?

A. Yes, sir; I had charge—after Mr. Willett's resignation, I had charge of his life insurance business and I had nothing to do with his personal business, that is R. H. Plant, mine was R. H. Plant, Manager, but I had nothing to do with his personal business other than to sign the checks, that was practically all, I believe—he had a good many bank accounts, and I had a power of attorney to sign these checks, he had bookkeepers over there, he had quite a force, he kept books and accounts of course with his life insurance business, in addition to that he kept a set of books for R. H. Plant.

Q. Just Plant individually?

A. A regular set of books for R. H. Plant, and Miss Morris was his private secretary and I suppose she was more conversant with his private business than anybody else, because she naturally had to know about different matters that he corresponded about, she absorbed a great deal of information about his affairs that the balance of us didn't have an opportunity to know anything about.

Q. From your opportunities, can you state whether that R. H. Plant individual business was of large volume or small?

A. It was large, Mr. Scott was the bookkeeper; Miss Morris didn't keep any books.

Q. Did that include his race horse business and things of that sort?

A. Well, his race horse business was handled there, but I don't think he had any regular books for that, it was kept more in the shape of memoranda and things of that kind, he and Miss Morris looked after that.

R. E. Findlay.

Mr. George H. Plant, a witness on behalf of the plaintiff deposes and says as follows:

Direct examination by Mr. Miller:

Q. Will you tell us how long your brother, Robert H. Plant, was ill or confined to his bed before his bank and the First National Bank closed their doors?

A. I think six or eight weeks.

Q. Who conducted the business of the private bank while your brother was confined to his home?

A. Charles D. Hurt, cashier.

Q. How long had he been with your brother?

A. I think he was with him about twelve or thirteen years.

George H. Plant.

Q. What position did he occupy more than an ordinary cashier? Was he a manager or simply acting under Mr. Plant's personal direction?

A. Both. In my brother's absence he was full manager.

Q. He had full control of the private bank?

A. Entirely.

Q. Giving credits and transactions also with other banks?

A. Entire authority.

Q. He had a right to manage generally with foreign banks or individuals, the affairs of the private bank?

A. Yes, sir; he had full power as far as I know.

Q. Did he in fact have full power?

A. We always recognized he had it.

Q. Who conducted the affairs of the First National Bank during Mr. Plant's absence from town, your brother, he was the president, was he not?

A. Yes, sir; I was vice president.

Q. Who was cashier?

A. At that time, Mr. Findlay.

Q. That is during your brother's illness?

A. Yes, sir.

Q. Does your recollection agree with Mr. Findlay's as to the time he came to the bank?

A. Perfectly.

Q. What knowledge did you have at the time these two banks closed as to your brother's solvency?

A. I thought he was perfectly solvent.

Q. Did you think he was rich?

A. He showed me a statement a few months before that in which it looked that way. That was what I was going by.

Q. At the particular date now of this \$3000 transaction with the American National Bank of Nashville, how did you consider him then, solvent or insolvent?

A. Perfectly solvent, that is the way I considered him at the time.

Q. Could you tell the court or examiner who handles that particular transaction by which that \$3000 draft was forwarded to Nashville?

A. I think it went through the regular course of business—those things were generally handed to the regular officers and went through—we handled a great many items in the bank, of course, they were generally handled in the regular course of business.

George H. Plant.

Q. Did you have any knowledge at the time of sending this \$3000 draft to Nashville, of your brother's account with that bank?

A. I simply knew he had an account there, but as a matter of course, I could not keep all those details—

Q. Did you know whether he owed that bank or had a balance to his credit?

A. I didn't know either way. He might have had a fifty thousand dollar balance there.

Q. Or might have owed a balance?

A. All those items change very rapidly; no one could have told, unless they kept the books.

Q. You had no means of knowing how his account stood there?

A. None in the world.

Q. How did the First National's account stand at that time with the American National?

A. I don't recollect.

Q. State now, please, what personal supervision of the bank's affairs your brother exercised during his illness at home, that last six or eight weeks of his life?

A. We consulted him as often as possible, say once or twice a day, about any very important things, all routine business and general management of the bank, Mr. Findlay and I would take up together and work it out ourselves without troubling him, we only asked him about things of extreme importance; we tried to take all the burden off of him we possibly could.

Q. Did you ask in any of those conversations about any deal with the American National Bank of Nashville?

A. I don't think he ever alluded to it once.

By Mr. Callaway:

Q. Mr. Robert H. Plant kept his private banking business that you spoke of as being under the charge of Mr. Chas. D. Hurt, separate from his individual private business, did he not?

A. Yes, sir.

Q. That individual private business was the one he conducted under the name of R. H. Plant?

A. That is right.

Q. Up at the New York Life Insurance agency?

A. Yes, sir.

Q. These private bank accounts he had, such as these checks I have shown Mr. Findley, and the account he had with the American National Bank, upon which this three-thousand-dollar check was drawn, those were operated through his New York Life office, and signed by Mr. Find-

George H. Plant.

L. T. Stallings.

lay as cashier, rather than by Mr. Chas. D. Hurt, as cashier and manager of the I. C. Plant's Son's Bank?

A. That is my recollection.

Q. Mr. Chas. D. Hurt was cashier of the private bank of I. C. Plant's Son?

A. Yes, sir.

Q. He was director of the First National Bank, was he not?

A. Yes, sir.

Q. And a member of the finance committee or executive committee?

A. I think he was at that time?

By Mr. Miller:

Q. Did your brother conduct a separate business, so to speak, independent of both the First National and the private bank, in his New York Life office, in various private transactions?

A. All of his private business was conducted in there.

Q. With Miss Morris as his private secretary?

A. You know he was in a good many private enterprises; I never saw his books any more than if I had not been in the same bank with him—all that was conducted up there.

Q. Was that a large volume of business?

A. I should think it was.

Q. Was there anybody else conversant with that business except himself and Miss Morris?

A. Not that I know of.

Q. In that separate business of Mr. R. H. Plant that was conducted in his New York Life office, Miss Morris, his secretary, kept regular books, didn't she?

A. I suppose so; I never saw them.

Q. I believe you have already stated he had a large outside private business?

A. Yes, sir.

Q. That didn't go into either one of the banks?

A. Yes, sir, he was interested in a great many various enterprises.

Geo. H. Plant.

Mr. L. T. Stallings, a witness produced on behalf of the plaintiff, being first duly sworn, deposes and says as follows:

L. T. Stallings.

By Mr. Miller:

Q. Can you state approximately how long Mr. Plant was ill prior to the closing of the two banks?

L. T. Stallings.

A. Well, approximately, it was several weeks, just how long, Judge, I don't know.

Q. Will you state who conducted the business of I. C. Plant's Son, the private bank, while Mr. Plant was away from home, or during these week's illness?

A. Chas. D. Hurt, the cashier.

Q. Did he appear to control the business or have its full management?

A. Yes, sir.

Q. Do you know that of your own knowledge, through interviews and intercourse with him?

A. Yes, sir.

Q. The two banks opened into each other, did not they?

A. Yes, sir.

Q. How often did you see Hurt during the business hours of the two banks?

A. I don't know just how often to state, frequently every day.

Q. How often during a day, in and out, or only just—

A. In and out all during the day.

Q. Not confined to long intervals then?

A. No, sir.

Q. Who conducted the business—before leaving that, to what extent did his authority seem to go in the making of loans and discounts and transactions with your bank and others?—Hurt's authority?

A. All matters that came under my observation, he seemed to have full power to dispose of.

Q. What gentlemen conducted the First National Bank's business while Mr. R. H. Plant was not present?

A. George H. Plant, the vice-president, and Mr. R. E. Findley, the cashier.

Q. What position did you occupy?

A. I was the general bookkeeper.

Q. You stood next in authority to those two gentlemen, then?

A. My position was not one of authority; I was merely an employee.

Q. Were next in your knowledge of the business, then, I would say?

A. Yes, sir; I had the opportunity of knowing as much about it as any man in the office; of course what was back of the transactions I didn't know.

Q. Well, did you know as much about the business as any man there?

A. Yes, sir, the apparent business, what was back of the transactions I did not know.

L. T. Stallings.

Q. You would not know whether a big negotiation had failed, for instance, it had to get on the books before you would know it?

A. Yes, sir.

Q. Do you recollect who handled the \$3,000 transaction with the American National Bank of Nashville?

A. The entries were made by myself.

Q. Do you know who forwarded the draft?

A. You mean who actually enclosed it?

Q. Well, gave directions about it, for instance?

A. The direction of the draft was made when I charged it up, when I made the entries for it, that settled the course the draft was to take.

Q. You would have a form or slip to enclose the draft in?

A. Yes, sir; but who enclosed it in the envelope, I do not know.

Q. Nobody had to write on the slip?

A. Yes, sir, a letter had to be written for it.

Q. Who wrote that?

A. Mr. Plant usually wrote the letters.

Q. Were they special letters or just a uniform blank used for the purpose?—a form?

A. A uniform blank form, sir.

Q. Do you mean Mr. George Plant or Mr. Robert H. Plant?

A. Mr. George H. Plant, sir.

Q. Do you recollect having received any—any of the officers having received personal directions from Mr. Robert H. Plant during his illness as to the conduct of the Bank?

A. I can't state any definite transactions; I knew they were in daily communication with him in regard to the affairs of the bank, sir, daily, or almost daily.

Q. Will you examine that receipt and state whether you are familiar with its contents (A receipt given by N. B. Corbin, receiver of Robert H. Plant, bankrupt, to W. F. Albertson, receiver of the First National Bank of Macon)?

A. Why, some of those items I recall, sir, I would not like to say that I can identify each one as enumerated here in this receipt—I recall distinctly the two larger items listed here, though, at the first, because Mr. Plant sent me a message to come by his house and see him—the matter of those two checks was discussed at the time, he asked me the fate of them. The other items some of them I recall, but each one, I would not like to say I remember the particular item.

L. T. Stallings.

Q. That was long before Mr. Plant's illness, was it not—you say Mr. Plant asked you to call by his house about those items?

A. Yes, sir, that was during his illness, because these two larger checks, if my memory was correct, were forwarded—it must have been the 13th or 14th of May, these two checks on the American Exchange National Bank.

Q. How many of the items can you identify?

A. The time has been so long I would not like to state definitely to the examiner that I can identify any of the other items, except these two larger ones, because my mind is clear on those two.

Q. Did you ever see the receipt after it was drawn, months later when the settlement was made?

A. I think I saw it, sir, and I was at the time familiar with the whole transaction.

Q. When you did see the original receipt that Mr. Davis and Mr. Callaway here worked out, I think, was it in that order with those two big items first?

A. That is my recollection and I will state also, sir, at the time I had no trouble to identify the items.

Q. All the items?

A. All the items at that time.

Q. When the original receipt was given and the transaction was fresh in your memory?

A. Yes, sir.

Q. What position did you occupy with Albertson, receiver?

A. I was his bookkeeper, sir.

Q. And that continued our familiarity with the affairs of both banks?

A. Yes, sir, thoroughly so.

Q. I will get you to write your initials on the foot of that paper in ink, for purposes of identification?

Q. Now, at the time of the illness of Mr. Plant and more especially at the time of this transaction with the Nashville bank, what was your knowledge of Mr. Plant's solvency or insolvency?

A. I had no accurate knowledge of his affairs, sir.

Q. He might have been rich or broke, either way, so far as you knew?

A. Yes, sir, the only opinion I could form was from hearsay evidence. I had nothing direct, sir, except this, from conversations with him and statements in regard to the profits on some of his enterprises, it looked like the man was going to be a rich man.

L. T. Stallings.

Q. Did you have any knowledge of his account with the Nashville bank at the time this draft was sent on?

A. Nothing further than I knew he kept an account there and drew against it from time to time.

Q. Could you say whether the balance at that time was for or against him?

A. I could not.

Q. Recurring to the transaction between Mr. Albertson and Mr. Corbin, the respective receivers, which resulted in that receipt being given, was the turning over of those papers by Albertson to Corbin of any benefit to the estate of R. H. Plant?

A. I so regarded it, sir.

Q. Did it enable the creditors of R. H. Plant's bank to obtain a larger fund or a larger dividend?

A. At the time, I thought it would greatly increase their dividend by reason of certain benefits resulting through that settlement both to the McCaw Company and I. C. Plant's Son's bank.

Q. Were I. C. Plant's Son's creditors actually benefited, from your knowledge of the transactions?

A. I should say they were.

By Mr. Callaway:

Q. How do you know these matters were of any benefit, Mr. Stallings, to the Plant estate?

A. Well, there were two reasons on which I based my opinion at the time and I have no reason to change it since; one was that by reason of this settlement the McCaw Manufacturing Company was kept a going concern, and also by reason of this settlement they were enabled to use the amount turned over to them as a set off against certain indebtedness of the I. C. Plant's Son to the McCaw Manufacturing Company.

Q. Those two checks on the American Exchange National Bank that you spoke of, the first two items on that receipt, one for \$22,000 and the other for \$20,000, the checks which you spoke of Mr. Plant sending for you and asking what the fate of it was—you mean whether they had been paid in due course?

A. Yes, sir.

Q. Whether they had been honored upon presentation or been turned down?

A. No, he had heard in some way, I don't know how, that there was some trouble about the payment of those two checks. I got a message to come to his house and see him. He asked particularly about them, he seemed to be very much surprised that they were not paid.

L. T. Stallings.

M. P. Callaway.

Q. Those two checks, together with those other checks Mr. Finlday testified about, this check on the American National Bank of Nashville, were checks turned over there on the 13th of May?

A. Yes, sir, in making up that clearing house settlement.

By Mr. Miller:

Q. Could you tell us where the original receipt is that Albertson got from Corbin, receiver?

A. I cannot, sir.

Q. Have you ever made any search for it at my request, heretofore?

A. Not that I recall; I had nowhere to search except in the files of W. J. Butler, receiver. There is where I am satisfied it is now.

Q. Did you search in such files as Butler, receiver, left here?

A. I didn't know he left his files here, sir.

M. P. Callaway.

Mr. M. P. Callaway, sworn, testified, a witness introduced on behalf of the plaintiff, first duly sworn, deposes and says, as follows:

By Mr. Miller:

Q. The firm of Erwin & Callaway were counsel for N. B. Corbin, receiver of Plant's estate?

A. Yes, sir, we were.

Q. You personally, however, did most of the work from the start?

A. I had active charge of most of the matters of the receivership.

Q. You are yourself an expert accountant?

A. No; I am not what is called a certified accountant or expert accountant, but I have an extensive knowledge of books, but I am not an expert accountant.

Q. You are thoroughly qualified to audit books, ain't you?

A. Yes, sir.

Q. By reason of that fact you thoroughly understand or have mastered the books of those two banks?

A. I understand the books of this bank, of I. C. Plant's Son's Bank.

Q. And the first National Bank, in so far as it affects I. C. Plant's Son?

A. I never had any access to the First National Bank's books except in this particular case.

M. P. Callaway.

Q. Now that Mr. Corbin himself is dead, and Mr. Davis, who was counsel for Albertson and his successor, Butler, is also dead, you know more about all these transactions than any living person?

A. Yes, sir.

Q. Were you familiar with the negotiations and final settlement between Albertson, as receiver of the First National, and Corbin, as receiver for R. H. Plant, Bankrupt?

A. Yes, sir.

Q. Did you take part in drawing up that receipt which has appeared in evidence and is identified by Mr. Stallings's signature?

A. I cannot say definitely as to that, but I am familiar with the settlement and the papers that were turned over to him as to the drawing of the paper, why, I don't remember.

Q. Will you please examine that receipt which bears Mr. Stallings' name and is offered in evidence as a copy of the original receipt—will you state whether that is a substantial copy or a literal copy of the original receipt?

A. I believe it to be.

Q. State further if that settlement and the turning over of the papers called for by the receipt to Corbin, receiver, was of any benefit to the estate and the creditors of Robert H. Plant, bankrupt?

A. Now, subject to the objection that all of this answer I make would be inadmissible on account of the agreements having been reduced to writing in the pleadings and this receipt setting out those facts, I will answer by saying that R. H. Plant individually was the endorser upon all of the outstanding notes of the McCaw Manufacturing Company, amounting to about a million and fifty-four thousand dollars, and also notes of the Red Cypress Company, amounting to about \$600,000 and the First National Bank, through its receiver, had declined to extend the notes of the McCaw Manufacturing Company, of which they held about \$200,000 or the notes of the Red Cypress Lumber Company and had notified us that they would file suit as soon as those notes matured, and those proceedings that were brought by us on behalf of I. C. Plant's Son's Bank were brought primarily to recover the papers that were turned over to us, and to force the First National Bank to give the McCaw Manufacturing Company time in order that they might get their affairs arranged and extend these notes and relieve the endorsement of Mr. Plant, and that was accomplished

M. P. Callaway.

for both the Red Cypress Lumber Company and the McCaw Manufacturing Company.

Q. Was the result of the transaction evidenced finally by the receipt to increase the estate of Robert H. Plant?

A. Yes, sir, the receipt, of course, does not show it, it is set out in the orders of the court approving these various settlements. They set out these details.

Q. Is it set out in the certified copy of the order that I have previously shown you and which goes forward to the court?

A. Yes, sir; to the extent of setting up that they had agreed to give the McCaw Manufacturing Company 60 days time and I probably should state in addition to that, that as Mr. Stallings has stated, of course all of the paper that was signed by the McCaw Manufacturing Company, these two checks of \$20,000 and \$22,000 and the notes of the McCaw Manufacturing Company for \$16,000 were set off against their deposit with I. C. Plant's Son's Bank to that extent of course reducing our ultimate liability or provable claim; that was true, also, of the notes of the Red Cypress Company.

Q. In other words, reducing the number of participants in the I. C. Plant's fund?

A. Yes, sir.

Q. And the checks of R. H. Plant on those several banks were treated in the same way?

A. Those amounts were set off by those banks against Mr. Plant's indebtedness to them and proof of claim made for the difference.

Q. To put it in language for a layman to understand it, the result of it all was to give the creditors who proved against Plant in bankruptcy a larger dividend?

A. That was the result of it. This testimony of mine is subject to the objection that it is all incompetent and inadmissible (underscored words marginal, in pencil. Clerk.) for the reason that the receipts and orders of court set out in writing the transactions and that my testimony in explanation would be incompetent.

Q. Would you object to putting your name on that receipt and identifying that particular paper about which you testified?

A. No, I have no objection.

M. P. Callaway.

The following is the receipt, or copy thereof, testified to by Stallings and Callaway, viz:

In the Circuit Court of the United States for the Western
Division of the Southern District of Georgia.

The McCaw Manufacturing Company,

vs.

Walter F. Albertson, Receiver, First
National Bank, Macon, Ga.

} In Equity.

Received of Walter F. Albertson, receiver of the First National Bank, Macon, Georgia, in full settlement and performance of the agreement and settlement entered into between the parties in the above-stated cause on the — day of June, 1904, and which was duly approved by the Comptroller of the Currency, and by his Honor Judge Emory Speer, in the Circuit Court of the United States for the Southern District of Georgia, on the 20th day of June inst. and in full settlement and performance of the decrees of the Circuit Court for the Western Division of the Southern District of Georgia, rendered in the above-stated cases, the following notes and checks in said agreement, as aforesaid, fully described, to—

Check, McCaw Mfg Co. on the Amer. Exch. Nat'l Bank, N. Y.,	\$20,001.50
Check, McCaw Mfg Co. on the Amer. Exch. Nat'l Bank, N. Y.,	22,001.50
Check, R. H. Plant on Traders & Importers Nat'l Bank, N. Y.,	2,001.29
Check, R. H. Plant on Traders & Importers Nat'l Bank, N. Y.,	5,001.29
Check, R. H. Plant on Nat'l Bank of Com- merce of N. Y.,	5,001.50
Check, R. H. Plant on Oriental Bank, New York,	1,500.00
Check, R. H. Plant on Importers & Traders Nat'l Bank, N. Y.,	2,500.00
	<hr/> \$63,008.58
Note, McCaw Manufacturing Company, dated Jan. 19, 1904, due May 26, 1904, for \$10,- 000.00 less \$2,000.00 paid,	8,000.00
Note, McCaw Manufacturing Company, dated April 23, 1904, due August 23, 1904,	10,000.00
Note, Red Cypress Lumber Company, dated March 25, 1904, and due July 25, 1904,	6,000.00
	<hr/> \$87,008.58

This 23 day of June, 1904.

(Signed) N. B. Corbin, Rec'r in Bankruptcy
of R. H. Plant.

L. T. Stallings,
M. P. Callaway,

C. D. L. Cork, Comm.

The foregoing depositions and receipt endorsed: Filed April 19, 1909. H. M. Doak, Clerk.

The following, in the bill of exceptions, appears before the introduction of M. P. Callaway's deposition, viz:

During the progress of the reading of the foregoing deposition of L. T. Stallings, defendant's counsel objected to that part of his testimony which it was claimed set forth a supposed settlement made between the trustee in bankruptcy of the estate of R. H. Plant and the receiver of the First National Bank and the receipt given therefor; the ground of such objection being that it appeared that whatever settlement was made was in writing and the written documents were the best evidence of the transaction. This objection was sustained by the court.

Plaintiff's counsel then offered in evidence a certified copy of the court proceedings between Corbin and Alverstein, which was objected to by defendant's counsel, because it had never been filed in evidence in that case, and there was no plea raising any question under that settlement and the introduction of the paper might call for parol testimony on the part of defendant, and that it was not in rebuttal of anything brought out in defendant's testimony (sten. rep. 45).

The court excluded the testimony on the ground that there was no plea setting up the supposed estoppel and counsel for plaintiff duly noted an exception to the ruling of the court (sten. rep. 48).

Plaintiff's counsel then asked leave to amend third count of their declaration so as to set up the defence of estoppel but subsequently withdrew such application to amend. (sten. rep. 48). This was all of the testimony presented to the court and jury in this cause.

~~Plaintiff's~~ counsel then moved the court for peremptory instructions to the jury instructing them to find a verdict for the defendant. (sten. rep. 50-50 1-2).

Plaintiff's counsel moved the court to "take the case and consider it on the testimony." (sten. rep. 50). It was then insisted by plaintiff's counsel that the two motions were "tantamount to taking the case away from the jury or is a demurrer to the evidence." (sten. rep. 50). Plaintiff's counsel then stated that their motion was to direct a verdict in favor of the plaintiff for \$3,000, with interest from May 24th, 1904, the date the check was charged back (sten. rep. 50 1-2).

After argument of counsel the court charged the jury as follows:

Oral Opinion and Charge of Court.

Plaintiff's counsel then renewed their motion for peremptory instructions.
Defendant's

The Court:

Counsel agree, as I understand, that the jury may be sworn now. It was an error, really, in the recollection of the court. Let the jury be now sworn.

Gentlemen of the jury, both the plaintiff and the defendant have moved the court to give the jury peremptory instructions in this case in favor of the two sides, respectively, and under these two motions it becomes the duty of the court to find the facts and give the jury peremptory instructions as to the verdict which they shall return.

I am of opinion that in so far as the prima facie case of the plaintiff is concerned, the plaintiff has made out his case by the weight of the evidence and practically the undisputed evidence and so find as a fact, that the plaintiff has proved the material facts alleged in the declaration, in so far as they are necessary to make out the plaintiff's prima facie case in reference to the three thousand dollar check in question and the crediting that check to the First National Bank of Macon, Ga., of which plaintiff is the agent, so that, unless the defenses set up by the defendant bank in its pleadings, are made out by the proof and are well founded in point of law, the plaintiff would be entitled to a verdict for three thousand dollars with interest from the time that demand was made for the payment of the check and refused by the defendant bank.

In that view of the case it becomes necessary to find whether the defendant has made out the defenses set up in its pleas. In reference to those defenses, I find the material facts established by the weight of the evidence to be as follows:

First, that the day that check was drawn by R. H. Plant, Plant was insolvent, and that he knew his own insolvency; that he was on that date the president of the First National Bank of Macon, Ga., and had been for some time; that R. H. Plant was also on that date indebted to the defendant, the American National Bank of Nashville, in the sum of fifty thousand dollars on account of his accepted drafts which had been endorsed over to the American National Bank, and were then held by it, so although the said accepted drafts were not then due and did not mature until some time after April 16th, 1904; and that R. H. Plant himself knew that the American National Bank on the day the three thousand dollar check was drawn on it on Plant's account, and on May 16th, 1904, when it charged that check to Plant's individual account and credited it to the account of the First National

Bank of Macon, Ga., as I find it did, and advised them of that credit by letter of advice had no knowledge of Plant's insolvency, it didn't know that he was then insolvent or that the petition in bankruptcy had been filed against him.

I further find as a fact, from the proof, that the three thousand dollar check drawn by Plant was taken by the First National Bank of Macon, Ga., as a credit on a balance of a much larger amount that R. H. Plant then owed the First National Bank of Macon, Ga., arising out of the clearing house transactions, and when it had been so taken as a credit, it was forwarded by the First National Bank on May 14th, 1904, as shown by the stipulation of facts; that R. H. Plant was a large stockholder and president in the First National Bank and controlled its policy and management, and that it was a general custom in the bank to accept and discount any paper that he might send to them and to credit upon his account any paper that he might send for the purposes of credit, but that paper received for the purpose of credit was generally credited by the bank irrespective of any such custom, under a general habit to credit whatever a man would send for the purpose of credit; that at the time this three thousand dollar check was drawn, R. H. Plant was not at the bank and had not been there for some five or six weeks, although he had been in frequent, if not daily, communication with the officers of the bank; that he gave no specific directions in reference to this particular check to the officers of the First National Bank, who were conducting his affairs during his sickness, at least, there is no evidence that shows that fact by the weight of the evidence; that the officers and agents of the First National Bank of Macon, who were conducting its affairs during his sickness, and who received and accepted this three thousand dollar check and forwarded it to the defendant bank, had, when they received and forwarded it, no knowledge of Plant's insolvency, and that they furthermore had no knowledge of the fact that Plant was individually indebted to the American National Bank by reason of his five (the word "fifty" is writ in pencil over the word "five" —Clerk.) thousand dollars of accepted drafts; they did not know that he was then indebted to the American National Bank in any sum; that the private bank of I. C. Plant's Sons, which was really Plant himself, he doing business under that name, closed its doors early on the morning of the 16th and was insolvent, and that a petition in bankruptcy was filed against Plant himself after eleven o'clock that morning, and that he was subsequently adjudged a

bankrupt. That the officers of the First National Bank at Macon, Ga., knew, according to the weight of the proof, that that petition in bankruptcy had been filed, and they knew of the suspension of business of Plant's private bank after it occurred; that the First National Bank of Macon was also compelled to close its doors something after nine o'clock of the same morning and did close its doors; that later in the day, some time after the closing of the First National Bank, the American National Bank of Nashville credited the account of the First National Bank of Macon with the amount of this three thousand dollar check and sent a letter of advice to the First National Bank of Macon on the night mail; that when that credit was entered up, the officers of the American National Bank of Nashville had no knowledge of Plant's insolvency or of any of the matters that had occurred on that day at Macon, Ga., and that the officers of the First National Bank of Macon, who had forwarded the three thousand dollar check on the 14th, did not notify by telegram, the American National Bank of the fact of the filing of the petition in bankruptcy or of the suspension of Plant's private bank. That, thereafter, on learning these facts, within a few days the American National Bank changed back its entries on the books and charged off that credit which it had given the First National Bank for the three thousand dollar check and applied the balance, or endeavored to apply by book entries, the amount of the balance standing to Plant's individual account, which was something over three thousand dollars, independent of this check, to that \$50,000.00 indebtedness; that, subsequently, at a precise date not apparent, the First National Bank or its representatives who had title to its claim, whatever its claim might be, made demand on the American National Bank for payment of that three thousand dollars which had been credited to that bank on the 16th, and that the American National Bank refused to pay it. Now, those are the material facts, as I find them.

On those facts I charge you as a matter of law, that the individual knowledge of Mr. Plant of his own insolvency and of his debt to the American National Bank is not imputable to the First National Bank of Macon in reference to this particular transaction, and that there was no breach of duty on the part of the First National Bank in not advising the American National Bank when it forwarded this check, of Plant's insolvency; and no breach of duty in not communicating to the American National Bank the fact of his embarrassment in his financial condition after they did ascertain it, as the officers of

the First National Bank did not know that he owed anything to the American National Bank and there was, therefore, no occasion for them to communicate to it the fact of his embarrassed financial condition; and that there was no breach of duty on the part of the First National Bank, and that the check having been presented to the American National Bank and accepted by it, and in effect paid by crediting the amount of the check to the First National Bank, and charging it to Plant's account, it became indebted to the First National Bank of Macon in the amount of the check so credited, and it was their duty therefore to pay that amount when demanded by the First National Bank of Macon, and its legal representative and they were not authorized, as a matter of law, to make the subsequent changes which they did, under the theory which the defendant had of the case, but which, of course they did acting entirely in good faith in the matter.

I therefore charge you on these facts, that the plaintiff has made out his case, and that as the date on which the demand was made for the payment of the three thousand dollars does not appear, you will return a verdict in favor of the plaintiff for the sum of \$3,000 with interest from July 25th, 1907, the date on which this suit was brought.

By Mr. Andrews for plaintiff:

I want to move that you charge the jury that interest is chargeable on this account from the date that the American National Bank repudiated its indebtedness to the First National Bank, by charging it back upon its books.

The Court: I decline the request.

The Court: Now, gentlemen, you will calculate that interest, or if counsel will agree on the amount, you may return it without leaving your seats.

By Mr. Gaut for defendant: Would your Honor allow suggestions as to any fact we think ought to be found?

By the Court: Yes.

By Mr. Gaut for the defendant: We would like your Honor to find that Mr. Hurt, cashier of the Plant Bank, was a director and also a member of the finance and executive committee of the First National Bank.

The Court: I so find.

By Mr. Gaut for defendant: Your Honor, I take it we are bound to except to your Honor's instructions before the jury retires.

The Court: Yes, that is the rule.

By Mr. Gaut for defendant: At all events I enter such exception.

The Court: That exception may be noted.

By Mr. Gaut for Plaintiff: (sic). And we also except to the instructions that they find interest at all, and your Honor charged that Mr. Plant dictated the policy of the First National Bank. I think the proof would warrant your Honor in going a little further than that. Our assistance was, and I think the proof sustains it, that he was really the manager of the bank; that the cashier had no management of the bank except such as Mr. Plant saw fit to concede and that Mr. Plant was really the manager of the bank.

The Court: Well, I think the finding as made substantially states the facts. Well, I find that he was the general manager of the affairs of the bank. I will find that fact.

Mr. Gaut for defendant: I don't know whether I made my exception as explicit as I should have made it. We except, of course, may it please your Honor, to your Honor's action in instructing the jury to find for the plaintiff for any amount.

The Court: Yes, I understood it that way and you may note it.

By Mr. Andrews for plaintiff: I want to except to your Honor's charge, or that part of your Honor's charge which finds that Mr. Plant was a stockholder in the First National Bank of Macon.

The Court: The exception may be noted and is overruled.

By Mr. Baxter for plaintiff: We wish to write out that request we have made orally.

The Court: The stenographer has taken it down and that is sufficient.

By Mr. Gaut for defendant: We are willing for the clerk to calculate the interest.

Defendant's counsel entered the following motion for a new trial.

Motion for New Trial.

A. L. Miller, Agent,

vs.

American National Bank at Nashville, Tennessee.

Law.

No. 3494.

The defendant in this cause moves the court for a new trial and assigns as grounds for such motion to following:

1. The court erred in instructing the jury to find a verdict for the plaintiff.

2. The court erred in not instructing the jury to find a verdict for the defendant.

3. The court erred in instructing the jury to allow any interest on the \$3,000.00, the damage laid in the summons being only \$3,000.00.

4. The court erred in assuming that in law the duty devolved on him to find the facts in the case.

5. The court erred in deciding that the duty devolved upon him to find any fact or facts which were the subject of conflict in the testimony, if such conflict exists, or seriously in doubt, if there be such.

6. If the duty did devolve upon the court to find the facts in the case, then the court erred in not finding as facts, that said R. H. Plant, as manager of said First National Bank, had a long standing arrangement and understanding with the cashier and other subordinate employees of the bank that the bank was to receive whatever commercial paper or checks he, or the cashier of I. C. Plant's Son's Bank might send to the First National Bank for discount or for credit on indebtedness due from him or from I. C. Plant's Son's Bank to receive without question such paper so sent for said purpose or purposes and it had been long understood that the cashier or other officers of the bank had no discretion as to the reception of such paper, but must accept whatever was so sent; that the fact that said R. H. Plant was dictating the transactions of the bank, especially as to its dealings with himself and with his bank, was known to the directors of the First National Bank and that said arrangement, understanding and custom had continued down to and including the time of the transaction in question; that the \$3,000 check in question was the check of said Plant and, with a large amount of other paper, had been delivered by him, through the cashier of I. C. Plant's Son's Bank, to the First National Bank as a means of payment of a large indebtedness which the said I. C. Plant's Son's Bank owed the said First National Bank for carrying the clearing house balance of said I. C. Plant's Son's Bank, and that no officer of said First National Bank except Plant himself passed upon the question whether said paper, including said check, should or not be so received.

7. The court, if bound to find the facts, erred in not finding that said Plant's acceptances, amounting to \$50,000.00, held by the American National Bank, were drafts drawn by him on said I. C. Plant's Son's Bank, and accepted by said bank.

8. The court erred in not finding, as a conclusion of law, that the knowledge of said Plant of his insolvency

and his indebtedness to the American National Bank must be imputed to the said First National Bank.

9. The court erred in not finding that the knowledge of said Hurt, who was a director of the First National Bank and a member of its finance or executive committee, that I. C. Plant's Son's Bank and said Plant were indebted to the American National Bank in the sum of \$50,000.00 must be imputed to the said First National Bank.

10. The court erred in not deciding that the action of the American National Bank, in crediting said check to the First National Bank and charging the same to R. H. Plant and in mailing the letter of advice to that effect, was not binding on the American National Bank, because this action was taken in ignorance of the fact that said R. H. Plant was insolvent, that I. C. Plant's Son's Bank had suspended and closed its doors, and that a petition in bankruptcy had been filed against said Plant and because said action was taken under the mistaken belief that said Plant was solvent and his bank was continuing in business as it had been prior to the 16th day of May, 1904, and that no petition in bankruptcy had been filed against him and the court erred in not finding that said American National Bank, notwithstanding the action aforesaid, had the right to change back said check to the First National Bank and credit it to R. H. Plant and set off that amount against said \$50,000 of indebtedness due to said American National Bank.

11. The court erred in failing to find that there was no privity between said First National Bank and between plaintiff as the successor of said bank on the one hand and the defendant on the other hand, whatever recognition of said check had taken place on the part of defendant having taken place under the mistake of facts last above set out.

12. The court erred in not finding as a conclusion of law that the First National Bank had knowledge when it received said check and on the 16th day of May, 1904, that said R. H. Plant and I. C. Plant's Son's Bank were indebted to the American National Bank in the sum of \$50,000, and that having such knowledge, it was charged with the duty of informing defendant of said R. H. Plant's insolvency and the suspension of I. C. Plant's Son's Bank and of the filing of the petition in bankruptcy against him and because of such failure plaintiff cannot recover.

J. S. Pilcher,
John M. Gant,

Attorneys for Defendant.

Endorsed: Filed Nov. 9, 1909, H. M. Doak, Clerk, by
F. B. McLean, D. C. By leave of court defendant's coun-

sel filed the following amendment to its motion for a new trial:

The following amendment to the foregoing motion for new trial was filed, viz:

A. L. Miller, Agent,

vs.

American National Bank at Nashville, Tennessee.

} Law.

} No. 3494.

Defendant amends its motion for a new trial in this case and says:

If the finding of the court is to be regarded as a general finding, the court erred in finding for the plaintiff and in instructing a verdict for the plaintiff, there being no testimony to support such finding or instruction.

J. S. Pilcher,

John M. Gaut,

Attorneys for Defendant.

Endorsed: Filed Nov. 18, 1909, H. M. Doak, Clerk.

Upon said motion the court rendered the following opinion:

In the United States Circuit Court in and for the Middle District of Tennessee.

A. L. Miller, Agent,

vs.

American National Bank.

} Law.

} No. 3494.

I am of opinion that defendant's motion for a new trial should be overruled for the following reasons:

1. Both parties having requested the direction of the verdict unaccompanied by alternative requests for special instructions, it became the duty of the court to find the facts and direct a verdict thereon. *Merwin v. Magone*, (C. C. A. 2) 70 Fed. 776; *Magone v. Origet*, (C. C. A. 2) 70 Fed. 778; *Bradley Timber Co. v. White* (C. C. A. 2) 121 Fed. 779; *United States v. Bishop* (C. C. A. 8) 125 Fed. 181; *Phoenix Ins. Co. v. Kerr*, (C. C. A. 8) 129 Fed. 723; *Mead v. Chesbrough Co.*, (C. C. A. 2) 151 Fed. 998, 1002; *Anderson v. Messenger*, (C. C. A. 6) 158 Fed. 250, 253; *Mead v. Darling*, (C. C. A. 2) 159 Fed. 684; and *Beuttell v. Magone*, 157 U. S. 154, 157.

In *Beuttell v. Magone*, *supra*, the Supreme Court said that as "both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law," and that "this was necessarily a request that the court find the facts."

In *Anderson v. Messenger*, *supra*, Judge Severens, delivering the opinion of the Circuit Court of Appeals for this circuit, said: "At the conclusion of the evidence, both

the plaintiff and the defendant requested the court to charge the jury peremptorily, each in his own favor. . . . We are required by the opinion of the Supreme Court in *Beuttell v. Magone*, 157 U. S. 154 to hold that these mutual requests were the equivalent of a withdrawal of the facts from the jury and a submission of them for a finding by the court."

Obviously the present case does not fall within the qualification of this general rule stated by Judge Severens in the earlier case of *Minahan v. Grand Trunk Ry.*, 138 Fed., 37, 42, that the decision in *Beuttell v. Magone* "cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the party whose request is refused has coupled with his request other requests directed to particular aspects of the case, which repel the implication that the party had consented to a submission of the facts to the court," since the defendant's request for peremptory instructions in the present case were not coupled with the request for other special instructions "directed to particular aspects of the case."

2. The various additional findings of fact which it is urged should have been made by the court, if the duty devolved upon it to find the facts, in my opinion, so far as they are not in conflict with the facts as found, immaterial to the issues in the case. Furthermore, there was no request for such additional findings. At the conclusion of the general findings the counsel for the defendant were, at their request, allowed to suggest any facts which they thought ought to be found, and requested only two additional findings, one of which was specifically found by the court, and the other found in the main as requested. No request was made for any of the other findings of fact set out in the motion for new trial.

3. Interest was properly allowed from the date suit was brought. The Plaintiff in his declaration sued for \$3,000 with interest from May 16, 1904. While no demand was proved on any specific date prior to the bringing of the suit, the commencement of the suit was itself a demand, making proper the allowance of interest from that date. *Kaufman v. Tredway*, 195 U. S. 271, 273; 22 Cyc. 1550 and cases cited.

4. On the facts found, I am of opinion that, under the authorities, the individual knowledge of R. H. Plant of his own insolvency and of his debt to the defendant bank is not imputable to the First National Bank of Macon in reference to the transaction in question; that there was no breach of duty on its part in not advising the defendant bank of his insolvency at the time the check was forwarded

or afterwards, on learning of Plant's embarrassed financial condition; that the check having been in effect paid by the defendant bank charging it to Plant's account and crediting it to the Macon bank; that this credit could not be thereafter charged off by the defendant bank; and that the jury was properly directed to return a verdict in favor of plaintiff for the amount of the check with interest from the bringing of the suit. See especially *National Bank v. Burkhardt*, 100 U. S. 686; *Levy Mule Co. v. Kaufman* (C. C. A. 5) 114 Fed. 170; *Bank of Overton v. Thompson* (C. C. A. 8) 118 Fed. 798; *Montgomery Co. v. Cochran* (C. C. A. 5) 126 Fed. 456; *Earle v. Munce*, (C. C. A.) 133 Fed. 1008; *McCalmont v. Lanning*, (C. C. A. 3) 154 Fed. 353; *Union Central Life Ins. Co. v. Robinson* (C. C. A. 5) 148 Fed. 358; *Witland v. Denise*, 50 N. J. Eq. 482.

5. An order will accordingly be entered overruling the motion for a new trial.

Sanford, Judge.

January 31, 1910.

Endorsed: Filed Feb. 1, 1910, H. M. Doak, Clerk.

On this the 8th day of March, 1910, the defendant tendered the foregoing bill of exceptions, and the same is on the same day signed and made part of the record in the cause and filed as such.

Edward T. Sanford, Judge.

Endorsed: Filed March 8, 1910, H. M. Doak, Clerk.

The following writ was issued, to-wit:

The President of the United States of America, to the marshal of the Middle District of Tennessee, Greeting:

You are hereby commanded to summon the American National Bank of Nashville, Tennessee, a corporation chartered and organized under the laws of the United States and a citizen of Nashville, Tennessee, doing business in Nashville, if to be found in your district, to be and appear before the judges of the Circuit Court of the United States, in the Sixth Circuit for the Middle District of Tennessee, at the Federal court room at Nashville, in said State, on the first Monday in April next, then and there to answer the action at law of A. L. Miller, Agent of the First National Bank of Macon, Georgia, a corporation chartered and organized under the laws of the United States and a citizen of the State of Georgia, formerly doing business in that State, said Miller being also a resident and citizen of the State of Georgia, to damage three thousand dollars. Herein fail not and have then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this the 25th day of February, in the year of our Lord one thousand nineteen hundred and six and of the independence of the United States the one hundred and thirty-first year.

(Seal)

H. M. Doak, Clerk.

Endorsed: This summons issued on the 25th day of Feby., 1907. H. M. Doak, Clerk.

Returned: Within came to hand Feby. 26, 1907, and served the same day received upon the American National Bank of Nashville, Tennessee, by reading to W. W. Berry, President of said bank, in the city of Nashville, Tenn., and delivered to him a copy of writ and bill.

John W. Overall, U. S. Marshal,

Per J. M. Duggan, Deputy Marshal.

The following declaration was filed, to-wit:

A. L. Miller, Agent,

vs.

American National Bank at Nashville, Tennessee.

} Law.

The plaintiff, A. L. Miller, as agent for the First National Bank of Macon, Georgia, a banking corporation duly formed, chartered, organized and existing under and by virtue of the laws of the United States, and a citizen of the State of Georgia, and of the United States of America, by his attorneys, complains of the defendant, the American National Bank of Nashville, Tennessee, a banking corporation duly formed, chartered, organized and existing under and by virtue of the laws of the United States of America, and a citizen of the State of Tennessee; a citizen of the United States of America; and inhabitant of the Middle District of Tennessee, and says:

Ist Count: Plaintiff avers that on May 14th, 1904, and for some time prior thereto, both said First National Bank of Macon, Georgia, and R. H. Plant, also of Macon, Georgia, were respectfully depositors in, and kept running accounts with the aforesaid defendant, the American National Bank of Nashville, Tennessee, and that said R. H. Plant on that date had to his credit in said defendant bank more than the sum of three thousand dollars.

Plaintiff further avers that on May 14th, 1904, said R. H. Plant, being justly indebted to said First National Bank of Macon, Georgia, drew his check on said American National Bank, of Nashville, Tennessee, in favor of said First National Bank of Macon, Georgia, in the sum of three thousand dollars and delivered said check to said First National Bank of Macon, Georgia, in payment of the

aforesaid indebtedness, which check said First National Bank of Macon, Georgia, endorsed and forwarded the same through the mails to said defendant bank with instructions to place the same to the credit of said First National Bank of Macon, Georgia, on the books of said defendant bank.

Plaintiff further avers that said defendant bank received said check on May 16th, 1904, and in accordance with the aforesaid instructions, on the aforesaid date, placed the amount of said check to the credit of the First National Bank of Macon, Georgia, and charged the amount thereof against said R. H. Plant, the drawer of said check as aforesaid, and on said date duly notified said First National Bank of Macon, Georgia, to that effect.

Plaintiff further avers that on or about May 16, 1904, said First National Bank of Macon, Georgia, became insolvent; that on or about said date Walter F. Albertson was duly appointed receiver of said bank by the Comptroller of the Currency under the provisions of Section 5234 of the Revised Statutes of the United States and Section 1 of the Act of Congress of June 30, 1876, chapter 156; that on July 20, 1904, said Albertson resigned as said receiver and W. J. Butler was duly appointed by said Comptroller of Currency to succeed said Albertson as receiver aforesaid; that on or about July 1, 1906, B. M. Davis was duly elected and qualified as agent of said bank under and by virtue of Section 3 of the Act of Congress of June 30, 1876, chapter 156 to succeed said last mentioned receiver and to continue the winding up of the affairs of said bank; and that on or about July 9, 1906, said plaintiff, A. L. Miller, was duly elected and qualified as agent of the said bank under and by virtue of Section 3 of the Act of Congress of June 30, 1876, chapter 156, to succeed said Davis as agent as aforesaid and to continue the winding up of the affairs of said bank.

Plaintiff further avers that under and by virtue of his election and qualification as agent of said First National Bank of Macon, Georgia, as aforesaid, he became vested with the title to and entitled to the possession of all of said insolvent bank's property and assets and empowered to bring suit for the purpose of obtaining the same and collecting and receipting for the amount of said check.

Plaintiff further avers that said R. H. Plant prior to May 14, 1904, drew certain time drafts payable to his own order and aggregating fifty thousand dollars, which drafts were drawn upon and accepted by I. C. Plant's Sons Bank of Macon, Georgia, and were afterwards endorsed by the said R. H. Plant for value to the defendant; but plaintiff avers that when the defendant received said check from

said First National Bank of Macon, Georgia, and credited the amount thereof to the credit of said First National Bank and charged the same amount to said Plant as aforesaid, said defendant thereafter held the said amount of three thousand dollars, represented by said check, for the use and benefit of said First National Bank of Macon, Georgia, and under an implied promise to said First National Bank of Macon, Ga., to pay to it the amount of said three thousand dollars on demand.

It is further averred by plaintiff that, although due demand for the payment of said sum of three thousand dollars so deposited and held by said defendant bank, by and for the use of said First National Bank of Macon, Georgia, has been duly made by plaintiff upon said defendant bank, said defendant bank has failed and refused and still fails and refuses to pay said sum or any part thereof to plaintiff as agent aforesaid.

Wherefore plaintiff prays judgment against said defendant bank in the sum of three thousand dollars with interest thereon from May 16, 1904.

2nd Count. For further cause of action, plaintiff says:

Plaintiff avers that on May 14, 1904, and for some time prior thereto, both said First National Bank of Macon, Georgia, and R. H. Plant also of Macon, Georgia, were respectively depositors in and kept running accounts with the aforesaid defendant, the American National Bank of Nashville, Tennessee, and that said R. H. Plant on that date had to his credit in said defendant bank more than three thousand dollars. Plaintiff further avers that on May 14, 1904, said R. H. Plant, being justly indebted to said First National Bank of Macon, Georgia, drew his check on said American National Bank of Nashville, Tennessee, in favor of said First National Bank of Macon, Georgia, in the sum of three thousand dollars, and delivered said check to the First National Bank of Macon, Georgia, in payment of the aforesaid indebtedness, which check said First National Bank of Macon, Georgia, endorsed and forwarded the same through the mails to said defendant bank with instructions to place the same to the credit of said First National Bank of Macon, Georgia, on the books of said defendant bank.

Plaintiff further avers said defendant bank received said check on May 16, 1904, and in accordance with the aforesaid instructions, on the aforesaid date, placed the amount of said check on its books to the credit of said First National Bank of Macon, Georgia, and charged the amount thereof against said R. H. Plant, the drawer of said check as aforesaid, and on said date duly notified the

said First National Bank of Macon, Georgia, to that effect.

Plaintiff further avers that on or about May 16, 1904, said First National Bank of Macon, Georgia, became insolvent; that on or about said date Walter F. Albertson was duly appointed receiver of said bank by the Comptroller of the Currency under the provisions of Section 5234 of the Revised Statutes of the United States and Section 1 of the Act of June 30, 1876, chapter 156; that on July 30, 1904, said Albertson resigned as said receiver and W. J. Butler was duly appointed by said Comptroller of the Currency to succeed said Albertson as receiver as aforesaid; that on about July 1, 1906, B. M. Davis was duly elected and qualified as agent of said bank under and by virtue of Section 3 of the Act of Congress of June 30, 1876, chapter 156, to succeed said last named receiver and to continue the winding up of the affairs of said bank; and that on or about the July 9th, 1906, said plaintiff, A. L. Miller, was duly elected and qualified as the agent of said bank under and by virtue of Section 3 of the Act of Congress of June 30, 1876, chapter 156, to succeed said Davis as agent aforesaid and to continue the winding up of the affairs of said bank.

Plaintiff further avers that under and by virtue of his election and qualification as agent of said First National Bank of Macon, Georgia, as aforesaid, he became vested with the title to and entitled to the possession of all of said insolvent bank's property and effects and empowered to bring suit for the purpose of obtaining the same and collecting and receipting for the amount of said check.

Plaintiff further avers that said R. H. Plant, prior to May 14, 1904, drew certain time drafts payable to his own order and aggregating fifty thousand dollars, which drafts were drawn upon and accepted by I. C. Plant's Sons Bank of Macon, Georgia, and were afterwards endorsed by the said R. H. Plant for value to the defendant; but plaintiff avers that none of said drafts were due on May 16, 1904, nor for some time after said date.

Plaintiff also avers that said defendant bank, without the knowledge or consent of the First National Bank of Macon, Georgia, illegally and wrongfully transferred from the account of said First National Bank of Macon, Georgia, on said defendant's books, an amount of money equal to said three thousand dollars check, after the same had been properly credited to said First National Bank of Macon, Georgia, and illegally and wrongfully converted said amount to its, defendant's, use and benefit by applying the same to the payment of said drafts drawn by said R. H. Plant on the said I. C. Plant's Sons Bank,

as aforesaid, and accepted by said Plant's Sons Bank, but none of which drafts were due and payable at the time of said wrongful and illegal transfer and conversion to the plaintiff's use and benefit as aforesaid.

It is also further averred by plaintiff that although due demand has been made by plaintiff for the payment of said sum of three thousand dollars, so deposited and held by said defendant bank, and which was illegally and wrongfully converted and misapplied by said defendant bank as aforesaid, has been made by plaintiff on it, said defendant bank has failed and refused and still fails and refuses to pay to plaintiff as agent, as aforesaid, said sum, or any part thereof to plaintiff's damage three thousand dollars.

Wherefore plaintiff prays judgment against the defendant in the sum of three thousand dollars with interest thereon from May 16, 1904.

Baxters,

Attorneys for Plaintiff.

Endorsed: Filed Feb. 25, 1907. H. M. Doak, Clerk.

The following pleas were filed, to-wit:

A. L. Miller, Agent,

vs.

American National Bank at Nashville, Tennessee.

Law.

No. 3494.

1st Plea. For plea to plaintiff's declaration defendant says, that on May 14, 1904, and some years prior thereto, R. H. Plant was carrying on in or near the city of Macon, Georgia, various kinds of business and among others was conducting a banking business in said city under the business name of "I. C. Plant's Sons Bank."

That on and for several years prior to said date the First National Bank of Macon, Ga., a corporation existing under the Acts of Congress creating National banks, was also conducting a banking business in said city. Both R. H. Plant as a banker and said First National Bank were on the 14th day of May, 1904, and had been for some years prior thereto, carrying running accounts in defendant's bank in the city of Nashville, Tennessee. On said date R. H. Plant was, and for several months prior thereto had been hopelessly insolvent and seriously embarrassed in a desperate attempt to save himself from financial failure and bankruptcy. On that date said Plant was indebted to the defendant in the sum of fifty thousand dollars and also had to his credit in defendant's bank the sum of about thirty-eight hundred dollars and the First National Bank had to its credit the sum of fourteen hun-

dred and sixty-four dollars and fifty-nine cents. On Saturday, May 14, 1904, said R. H. Plant drew a check on defendant's bank in favor of the First National Bank for three thousand dollars, which was remitted by said bank by mail to defendant's bank and the latter received the same on Monday, May 16th, and on that day credited it to said First National Bank and charged it to said Plant and sent advice of its action to said First National Bank by the night mail of the same date.

Said Plant never opened the doors of his bank after Saturday, May 14th, but posted a notice on the door of said bank before nine o'clock Monday morning stating that the bank had suspended. In the mean time a petition in bankruptcy was being prepared to have him declared a bankrupt and the same was filed in the United States District Court at Macon, Ga., at 45 minutes after 11 o'clock May 16, 1904, and said Plant was in due course declared a bankrupt. Said three thousand dollars check was not charged to said Plant nor credited to said First National Bank until after the suspension of said Plant's bank. When said charging and crediting of said check by defendant took place and when advice of the same was mailed to the First National Bank the defendant was entirely ignorant of said Plant's insolvency and of the suspension of his bank and of the filing of the petition in bankruptcy and of the insolvency of the First National Bank and of its suspension. On the other hand said First National Bank had knowledge of said suspension and bankruptcy as soon as they respectively took place and did not inform defendant of the same. Under the laws of the State of Georgia and also under the laws of the State of Tennessee defendant had a lien on said deposit for the indebtedness due it and had the right to set off pro tanto the entire amount due from it to said Plant against the fifty thousand dollar indebtedness due to it from said Plant and would have exercised the right of set off had it known of said Plant's insolvency, suspension, or bankruptcy. Defendant supposed him to be entirely solvent and supposed his bank to be still open and transacting business and it was under such mistake that such charging and crediting of the check took place and advice thereof was sent to said First National Bank. Within a short time after defendant learned of said Plant's insolvency, suspension and bankruptcy, it charged back to said First National Bank said check for three thousand dollars and credited the same to said Plant's account for the purpose of exercising its right of set off, and said Plant and said First National Bank were duly informed of said action. Defendant promptly

paid to the First National Bank said sum of fourteen hundred and sixty-four dollars and fifty-nine cents to its credit prior to the deposit of said three thousand dollar check in hand offered and has always been willing to credit said Plant's estate with the amount of the three thousand dollars check on its indebtedness to said defendant.

2nd Plea. For further plea the defendant says that on May 14, 1904, and some years prior thereto R. H. Plant was carrying on in or near the city of Macon, Ga., various kinds of business in said city under the business name of "I. C. Plant's Sons Bank."

That on and for several years prior to said date the First National Bank of Macon, Ga., a corporation existing under the Acts of Congress creating national banks was also conducting a banking business in said city. Both R. H. Plant as a banker and said First National Bank were on said 14th day of May, 1904, and had been for some years prior thereto carrying running accounts in defendant's bank in the city of Nashville, Tennessee. On said date R. H. Plant was, and for several months prior thereto had been hopelessly insolvent and seriously embarrassed in a desperate attempt to save himself from financial failure or bankruptcy. On that date said Plant was indebted to the defendant in the sum of fifty thousand dollars and also had to his credit in defendant bank the sum of about thirty-eight hundred dollars and the First National Bank had to its credit the sum of fourteen hundred and sixty-four dollars and fifty-nine cents. On Saturday, May 14, 1904, said R. H. Plant drew a check on defendant bank in favor of the First National Bank for three thousand dollars which was remitted by said bank by mail to defendant bank and the latter received the same on Monday, May 16, and on that day credited it to the said First National Bank and charged it to said Plant and sent advice of its action to said First National Bank by the night mail of the same date.

Said R. H. Plant never opened the doors of his bank after Saturday, May 14th, but posted a notice on the door of said bank before nine o'clock Monday morning, May 16, stating that the bank had suspended. In the mean time a petition in bankruptcy was being prepared to have him declared a bankrupt and the same was filed in the United States District Court at Macon, Ga., at 45 minutes after 11 o'clock, May 16, 1904, and said Plant was in due course declared a bankrupt. Said three thousand dollar check was not charged to said Plant and credited to the First National Bank until after said suspension and after said

petition in bankruptcy had been filed. When said charging and crediting of said check by defendant took place and when advice of the same was mailed to the First National Bank the defendant was entirely ignorant of said Plant's insolvency and of the suspension of his bank and of the filing of the petition in bankruptcy and of the insolvency of the First National Bank and of its suspension. On the other hand, said First National Bank had knowledge of said suspension and bankruptcy as soon as it took place and did not notify defendant of either. Under the laws of the State of Georgia and also under the laws of the State of Tennessee defendant had the right to set off pro tanto the entire amount of due from it to said Plant against the fifty thousand dollars indebtedness due to it from said Plant and had a lien upon said deposit for the indebtedness due it and would have exercised the right of set off had it known of said Plant's insolvency, suspension and bankruptcy. Defendant supposed him to be entirely solvent and supposed his bank to be still open and transacting business and it was under such mistake that said charging and crediting took place of the check and advice thereof was sent to the First National Bank. Within a short time after defendant learned of said Plant's insolvency, suspension and bankruptcy, it charged back to said First National Bank said check for three thousand dollars and credited same to said Plant's account for the purpose of exercising its right of set off and said Plant and said First National Bank were duly informed of said action. Defendant promptly paid to the First National Bank said sum of fourteen hundred and sixty-four dollars and fifty-nine cents to its credit prior to the deposit of said three thousand dollar check and has offered and has always been willing to credit said Plant's estate with the amount of the three thousand dollar check on its indebtedness to defendant.

Endorsed: Filed Sept. 12, 1908. H. M. Doak, Clerk.

The following further plea was filed, to-wit:

A. L. Miller, Agent,

vs.

American National Bank.

3rd Plea. For plea to plaintiff's declaration defendant says: that on May 14, 1904, and some years prior thereto, R. H. Plant was carrying on in or near the city of Macon, Ga., various kinds of business and among others was con-

ducting a banking business in said city under the business name of "I. C. Plant's Sons Bank."

That on and for several years prior thereto the First National Bank of Macon, Ga., a corporation existing under the acts of Congress creating national banks was also conducting a banking business in said city. Both R. H. Plant as a banker and the First National Bank were on said 14 day of May, 1904, and had been for some years prior thereto, carrying running accounts in defendant bank in the city of Nashville, Tennessee. On said date R. H. Plant was and for several months prior thereto had been hopelessly insolvent and seriously embarrassed in a desperate attempt to save himself from financial failure and bankruptcy. On that date said Plant was indebted to the defendant in the sum of fifty thousand dollars and also had to his credit in defendant bank the sum of about thirty-eight hundred dollars and the First National Bank had to its credit the sum of fourteen hundred and thirty-four dollars and fifty-nine cents. On Saturday, May 14, 1904, said R. H. Plant drew a check on defendant bank in favor of the First National Bank for three thousand dollars which was remitted by said bank by mail to defendant bank and the latter received the same on Monday, May 16, 1904, and on that day credited it to said First National Bank and charged it to said Plant and sent advice of its action to said First National Bank by the night mail of the same date.

Said R. H. Plant never opened the doors of his bank after Saturday, May 14, but posted a notice on the doors of said bank before nine o'clock Monday morning stating that the bank had suspended. In the mean time a petition in bankruptcy was being prepared to have him declared a bankrupt and the same was filed in the United States District Court at Macon, Ga., at 45 minutes after 11 o'clock May 16, 1904, and said Plant was in due course declared a bankrupt. Said three thousand dollar check was not charged to said Plant nor credited to said First National Bank until after the insolvency and suspension of the bank of the said Plant. When said charging and said crediting of said check by defendant took place and when advice of the same was mailed to the First National Bank, the defendant was entirely ignorant of said Plant's insolvency and of the suspension of his bank and of the filing of the petition in bankruptcy, and of the insolvency of the First National Bank and of its suspension. On the other hand, on and before May 14, 1904, said First National Bank had knowledge of said insolvency of R. H. Plant and of his indebtedness to the American National Bank of \$50,000,

and that on May, 16, 1904, said First National Bank had knowledge of said Plant's suspension and did not inform defendant of the same. Under the laws of the State of Georgia and also under the laws of the State of Tennessee defendant had a lien on said deposit for the indebtedness due it and had the right to set off pro tanto the entire amount due from it to said Plant against the fifty thousand dollar indebtedness due it from said Plant and would have exercised the right to set off had it known of said Plant's insolvency, suspension or bankruptcy. Defendant supposed him to be entirely solvent and supposed his bank to be still open and transacting business and it was under such mistake that such charging and crediting of the check took place and advice thereof was sent to the First National Bank. Within a short time after defendant learned of said Plant's insolvency, suspension and bankruptcy, it charged back to said First National Bank said check for \$3,000 and credited the same to said Plant's account for the purpose of exercising its right of set off and said Plant and said First National Bank were duly informed of said action. Defendant promptly paid to the First National Bank said sum of fourteen hundred and sixty-four dollars and fifty-nine cents to its credit prior to deposit of said three thousand dollar check and has offered and has always been willing to credit said Plant's estate with the amount of the \$3,000 check on its indebtedness to said defendant.

J. S. Pilcher,

J. M. Gaut,

Attorneys for Defendant.

Endorsed: Filed Oct. 14, 1908. H. M. Doak, Clerk.

A replication was filed, to-wit:

A. L. Miller, Agent,

vs.

American National Bank.

Comes the plaintiff and for replication denies each and every allegation of defendant's pleas not herein specifically admitted or admitted by declaration, and upon defendant's said pleas joins issue.

Baxters,

Attorneys for Plaintiff.

Endorsed: Filed Sept. 15, 1908. H. M. Doak, Clerk.

The following replication was filed to 3d plea, viz:

A. L. Miller, Agent,

vs.

American National Bank.

Comes the plaintiff and for replication denies each and every allegation of defendant's third plea and amendments thereto allowed at trial on October 26, 1909, not herein specifically admitted or admitted by the declaration, and upon defendant's third plea joins issue.

Baxters,

Attorneys for Plaintiff.

Endorsed: Filed April 12, 1909. H. M. Doak, Clerk.

The following order allowing amendment to third plea was entered, viz:

A. L. Miller, Agent,

vs.

American National Bank.

The defendant moved the court to amend the third plea filed by leave of court on October 14, 1908, by amending the sentence on the second page, beginning with the words "on the other hand," so as to make said sentence read as follows:

"On the other hand, said First National Bank, on and before May 14 and May 16, 1904, had knowledge of said insolvency of R. H. Plant, and of his indebtedness to the American National Bank of \$50,000.00, and that on May 16, 1904, said First National Bank had knowledge of said Plant's suspension and bankruptcy as soon as they respectively took place."

Leave to make said amendment is granted upon condition that the cost of the entire cause up to this time shall be taxed to the defendant, and that plaintiff may thereupon have the case continued until the next term of the court, and, in case it is so continued and other depositions taken, that defendant shall be taxed with all the costs of taking such depositions, to which action of the court the defendants excepted, and thereupon the defendant having accepted said conditions and plaintiff having elected to continue the case, it is ordered and adjudged that the case be continued to the next term of the court and that the defendant pay all the costs of the cause up to this time, for which execution will issue; and the jury was thereupon discharged from further consideration of the case. Oct. 16, 1908.

The following order to amend pleadings was entered, viz:

A. L. Miller, Agent,

vs.

American National Bank.

In the above styled cause the defendant moved the court for leave to file an amended plea, alleging, in addition to the averments of the first plea, that the First National Bank of Macon, Ga., had knowledge on the 16th day of May, 1904, of the insolvency of R. H. Plant. To this motion the plaintiff objected but the same was allowed by the court on condition that defendant pay all the costs of the depositions taken in the cause and the plaintiff be allowed a continuance of might if he chose pursue the suit. Plaintiff not electing to ask a continuance said amended plea was filed, entitled the third plea, whereupon plaintiff reserved an exception and joined issue upon the said plea. By oversight this order was not entered on October 14th, on which day the application was made and allowed by the court; it is therefore ordered on this the 21st day of October, 1908, that it be entered now for then.

The following order was entered, viz:
 A. L. Miller, Agent,
 vs.
 American National Bank.

In the above cause, on motion of the plaintiff, he is allowed by the court until the 2nd day of November, 1908, to prepare and file a bill of exceptions in the said cause.

The following order was entered, viz:
 A. L. Miller, Agent,
 vs.
 American National Bank.

The defendant in this suit moves the court for leave to amend its motion for a new trial by adding thereto the following ground:

13. If the finding of the court is to be regarded as a general finding the court erred in finding for the plaintiff and in instructing a verdict for plaintiff, there being no testimony to support such finding or instructions, which amended motion is by the court allowed to be filed. To which action of the court plaintiff excepts. Nov. 21, 1909.

J. S. Pilcher,
 John M. Gaut,
 Attorneys for defendant.

The following verdict and judgment were entered, viz:
 A. L. Miller, Agent,
 vs.
 American National Bank.

This cause came on to be regularly heard before the court and a jury of good and lawful men, who were duly

sworn and the same having been duly tried upon the pleadings and evidence and motions being made by both parties hereto that the court give peremptory instructions to the jury in favor of said respective parties:

Thereupon, said motions were taken under advisement by the court and after due consideration thereof the court decided that under these two motions it became the duty of the court to find the facts and give the jury peremptory instructions, whereupon the court found the facts and instructed the jury to find upon the allegations and averments of the pleadings and the evidence before the court, a verdict in favor of the plaintiff in the sum of three thousand dollars with interest thereon from July 25, 1907, to date.

Whereupon the jury returned in open court a verdict in favor of the plaintiff in the principal sum of three thousand dollars and interest thereon in the sum of \$409.85.

It is, therefore, accordingly ordered, adjudged and decreed that the plaintiff recover of the defendant the sum of \$3409.85 and the costs of this cause, for which execution may issue. This 4th day of November, 1909.

Correct:

John M. Gaut,
Sloss D. Baxter.

The following order was entered, viz:

A. L. Miller, Agent,

vs.

American National Bank.

In this cause it is ordered by the court that defendant or complainant, as the case may be, may have thirty days from the action of the court upon motion for new trial within which to prepare a bill of exceptions. Nov. 11, 1909.

The following order was entered, viz:

A. L. Miller, Agent,

vs.

American National Bank.

This cause came on again to be heard upon the motion of the defendant for a new trial of this cause, for reasons set forth in said motion, and was argued by counsel and the court being advised in the premises does overrule said motion, to which ruling of the court, said defendant, by its counsel, excepts.

It is therefore considered and adjudged by the court that plaintiff go hence and recover of the defendant the

amount of the judgment heretofore entered in this cause, together with the interest therein provided and also the costs of this cause, to which judgment of the court, said defendant, by its counsel, excepts. And for good cause shown, leave is given the defendant to prepare and have allowed and signed its bill of exceptions in 30 days from this date. Feb. 4, 1910.

The following order was entered, viz:
 A. L. Miller, Agent,
 vs.
 American National Bank.

The defendant having heretofore presented its bill of exceptions, but the same not having been as yet approved by the judge, it is ordered that the time heretofore allowed for presenting and filing its bill of exceptions be extended for five days from this date. March 5, 1910.

The following order was entered, viz:
 A. L. Miller, Agent,
 vs.
 American National Bank.

The defendant this day presented its bill of exceptions, which is signed and made a part of the record in the cause and it is ordered to be filed as such. March 8th, 1910.

The following order was made, viz:
 A. L. Miller, Agent,
 vs.
 American National Bank.

This cause came on to be heard before the Hon. E. T. Sanford, judge, etc., upon motion of the defendant to correct and amend the bill of exceptions in this case, which was filed March 8, 1910, so as to make that paragraph therein relating to exhibit 14 thereto, read as follows:

"After argument of counsel the court charged the jury as set forth in exhibit 14 to this bill of exceptions, the pages of said exhibit on which said charge appears being marked 18 to 24, inclusive, and immediately thereafter, counsel for the respective parties made the motions and remarks, and the court made the statements and rulings as also set forth in said exhibit 14, on the pages marked 24, 25, 26, and 27, inclusive, which is now attached to said bill of exceptions and it is ordered by the court that said exhibit 14, covering pages marked 18 to 27, inclusive, shall stand as and be a part of said bill of exceptions and it is ordered that said exhibit No. 14 shall stand as part of the record in this cause.

We agree that the foregoing shall be made the judgment of the court.

John M. Gaut & Jas. S. Pilcher, Attorney for defendant.
Baxters, Attorneys for plaintiff.

Nov. 22, 1910.

The following petition for writ of error was filed, viz:
A. L. Miller, Agent,

vs.

American National Bank.

And now comes the American National Bank, defendant herein, and says that on or about the fourth day of November, 1909, and on the 4th day of February, 1910, this court entered judgment herein in favor of the plaintiff and against this defendant in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

J. S. Pilcher,

John M. Gaut,

Attorneys for Defendant.

Allowed: Edward T. Sanford,

U. S. District Judge holding the Circuit Court.

Endorsed: Filed March 28, 1910. H. M. Doak, Clerk,
by F. B. McLean, D. C.

The following assignment of errors was filed, to-wit:

A. L. Miller, Agent of the First National Bank of Macon, Ga.

vs.

American National Bank of Nashville,
Tennessee.

The defendant in this case, in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to-wit:

1. Upon the facts as found by the trial court, the court erred in instructing the jury to find a verdict for the plaintiff. The facts so found warranted instructions of a verdict for the defendant, if an instructed verdict was warranted at all.

2. Upon the facts as found by the court, the court should have instructed the jury to find a verdict for the defendant.

3. On the facts as found by the court, the defendant was ignorant of the insolvency, suspension, or bankruptcy of R. H. Plant when it made the book entries which are relied on as a payment of the check in question, and when it mailed its letter of advice, and supposed that said Plant was solvent, and was continuing in business. On the other hand, the First National Bank, when it received said check, received it with knowledge of the fact that said Plant was insolvent, and that he was indebted to the defendant in the sum of fifty thousand dollars, the knowledge of these facts possessed by said Plant and by Hurt being in law the knowledge of the First National Bank. Said First National Bank therefore knew these facts when it forwarded said check to Nashville, Tenn., to be placed to its credit. Said bank therefore acted in bad faith in not communicating these material facts to the defendant, and the court was in error in finding and charging as a matter of law that the individual knowledge of Mr. Plant of his own insolvency, and of his debt to the American National Bank is not imputable to the First National Bank of Macon in reference to this particular transaction, and that there was no breach of duty on the part of the First National Bank in not advising the American National Bank when it forwarded this check, of Plant's insolvency, as the officers of the First National Bank did not know of his insolvency; and no breach of duty in not communicating to the the American National Bank the fact of his embarrassment in his financial condition after they did ascertain it, as the officers of the First National Bank did not know that he owed anything to the American National Bank, and there was, therefore, no occasion for them to communicate to it the fact of his embarrassed financial condition; and that there was no breach of duty on the part of the First National Bank, and that the check having been presented to the American National Bank and accepted by it, and in effect paid by crediting the amount of the check to the First National Bank, and charging it to Plant's account, it became indebted to the First National Bank of Macon in the amount of the check so credited, and it was their duty therefore to pay that amount when demanded by the First National Bank of Macon, and its legal representatives, and they were not authorized, as a matter of law, to make the subsequent changes which they did, under the theory which the defendant had of the case, but which, of course, they did acting entirely in good faith in the matter.

The court was in error in not finding and charging that defendant was not precluded by said book entries and letter of advice from availing itself of the right of set-off.

4. On the facts as found by the court, the defendant was ignorant of the insolvency, suspension, or bankruptcy of R. H. Plant when it made the book entries which are relied upon as a payment of the check in question, and when it mailed its letter of advice, and supposed that said Plant was solvent, and was continuing in business. On the other hand, the First National Bank, before said book entries were made and said letter of advice was mailed, knew the fact that Plant was insolvent, had suspended the payment of his debts and the transaction of business, and that a petition in bankruptcy had been filed against him, and that said Plant was indebted to defendant in the sum of \$50,000, the knowledge of these facts possessed by said Plant and by Hurt being in law the knowledge of the First National Bank, and the bank having, through its other officers, knowledge of the insolvency. Said bank therefore acted in bad faith in not communicating these material facts to the defendant, and the court was in error in finding and charging that the individual knowledge of Mr. Plant of his own insolvency and of his debt to the American National Bank is not imputable to the First National Bank of Macon in reference to this particular transaction, and that there was no breach of duty on the part of the First National Bank in not advising the American National Bank when it forwarded this check, of Plant's insolvency, as the officers of the First National Bank did not know of his insolvency; and no breach of duty in not communicating to the American National Bank the fact of his embarrassment in his financial condition after they did ascertain it, as the officers of the First National Bank did not know that he owed anything to the American National Bank and there was, therefore, no occasion for them to communicate to it the fact of his embarrassed financial condition; and that there was no breach of duty on the part of the First National Bank, and that the check having been presented to the American National Bank and accepted by it, and in effect paid by crediting the amount of the check to the First National Bank and charging it to Plant's account, it became indebted to the First National Bank of Macon in the amount of the check so credited, and it was their duty, therefore, to pay that amount when demanded by the First National Bank of Macon, and its legal representatives and they were not authorized, as a matter of law, to make the subsequent changes which they did, under the theory which the de-

fendant had of the case, but which, of course, they did acting entirely in good faith in the matter. The court was in error in not charging that the defendant was not precluded by said book entries and letter of advice from availing itself of the right of set-off.

5. Upon the facts as found by the court, defendant was ignorant of the insolvency, suspension of business or bankruptcy of R. H. Plant when it made the book entries which are relied upon as a payment of the check in question, and when it mailed its letter of advice, and supposed that said Plant was solvent and was continuing in business. And the court erred in not holding and charging that, regardless of any question of bad faith on the part of the First National Bank, defendant was not precluded by said book entries and the mailing of said letter of advice, from availing itself of the right of set-off.

6. Plaintiff, upon the facts as found by the court, has no right to maintain this suit, because there was a want of privity between the First National Bank and defendant, the acts relied on as establishing privity having been performed in ignorance of said Plant's insolvency, suspension and bankruptcy, and the court was in error in not so holding and charging.

7. Upon the facts of the case as proved by the uncontroverted testimony in the case, the court was in error in instructing a verdict for the plaintiff. The facts justified an instructed verdict only on behalf of the defendant only.

8. Under the undisputed facts of the case, as shown by the testimony the court should have instructed a verdict in favor of the defendant.

9. Upon the undisputed facts proved in the case, the defendant was ignorant of the insolvency, suspension and bankruptcy of R. H. Plant when it made the book entries which are relied upon as a payment of the check in question, and when it mailed its letter of advice, and supposed that said Plant was solvent and was continuing in business. On the other hand, the First National Bank, when it received said check, received it with knowledge of the fact that said Plant was insolvent and that he was indebted to the defendant in the sum of \$50,000, the knowledge of these facts possessed by said Plant and by Hurt being in law knowledge of the First National Bank. Said First National Bank therefore knew these facts when it forwarded said check to Nashville, Tennessee, to be placed to its credit. Said bank, therefore, acted in bad faith in not communicating these material facts to the defendant and the court was in error in finding and charging that the individual knowledge of Mr. Plant of his own insolv-

ency and of his debt to the American National Bank is not imputable to the First National Bank of Macon in reference to this particular transaction and that there was no breach of duty on the part of the First National Bank in not advising the American National Bank when it forwarded this check, of Plant's insolvency, as the officers of the First National Bank did not know of his insolvency; and no breach of duty in not communicating to the American National Bank the fact of his embarrassment in his financial condition after they did ascertain it, as the officers of the First National Bank did not know that he owed anything to the American National Bank and there was, therefore, no occasion for them to communicate to it the fact of his embarrassed financial condition; and that there was no breach of duty on the part of the First National Bank, and that the check having been presented to the American National Bank and accepted by it, and in effect paid by crediting the amount of the check to the First National Bank, and charging it to Plant's account, it became indebted to the First National Bank in the amount of the check so credited, and it was their duty therefore to pay that amount when demanded by the First National Bank of Macon, and its legal representative and they were not authorized, as a matter of law, to make the subsequent changes which they did, under the theory which the defendant had of the case, but which, of course they did acting entirely in good faith in the matter. The court erred in not finding and charging that the defendant was not precluded by said book entries and letter of advice from availing itself of the right of set-off.

10. Upon the undisputed facts as proved the testimony, the defendant was ignorant of the insolvency, suspension or bankruptcy of R. H. Plant when it made the book entries which are relied upon as a payment of the check in question, and when it mailed its letter of advice, and supposed that said Plant was solvent and was continuing in business. On the other hand, the First National Bank, before said book entries were made and said letter of advice mailed, had knowledge of the fact that Plant was insolvent, had suspended the payment of his debts, and the transaction of business, that a petition in bankruptcy had been filed against him, and that said Plant was indebted to the defendant in the sum of \$50,000 the knowledge of these facts possessed by said Plant and by Hurt being in law knowledge of the First National Bank, and the other officers of the bank having knowledge of the insolvency, suspension and bankruptcy. Said bank therefore acted in bad faith in not communicating these material

facts to the defendant, and the court was in error in not so holding and charging, and in charging that the individual knowledge of Mr. Plant of his own insolvency and of his debt to the American National Bank is not imputable to the First National Bank of Macon in reference to this particular transaction, and there was no breach of duty on the part of the First National Bank in not advising the American National Bank when it forwarded this check, of Plant's insolvency, as the officers of the First National Bank did not know of his insolvency; and no breach of duty in not communicating to the American National Bank the fact of his embarrassment in his financial condition after they did ascertain it, as the officers of the First National Bank did not know that he owed anything to the American National Bank, and there was, therefore, no occasion for them to communicate to it the fact of his embarrassed financial condition; and that there was no breach of duty on the part of the First National Bank and that the check having been presented to the American National Bank and accepted by it and in effect paid by crediting the amount of the check to the First National Bank and charging it to Plant's account, it became indebted to the First National Bank of Macon in the amount of the check so credited, and it was their duty, therefore, to pay that amount when demanded by the First National Bank of Macon and its legal representatives and they were not authorized, as a matter of law, to make the subsequent changes which they did, under the theory which the defendant had of the case, but which, of course, they did acting entirely in good faith in the matter.

11. Upon the undisputed facts as proved by the testimony defendant was ignorant of the insolvency, suspension of business or bankruptcy of R. H. Plant when it made the book entries which are relied upon as a payment of the check in question and when it mailed its letter of advice, and supposed that said Plant was solvent and was continuing in business. And the court erred in not holding and charging that, regardless of any question of bad faith on the part of the First National Bank, defendant was not precluded by said book entries and the mailing of said letter of advice, from availing itself of its right of set-off.

12. Upon the undisputed facts as proved by the testimony, plaintiff has no right to maintain this suit because there was a want of privity between the First National Bank and defendant, the acts relied upon as establishing privity having been performed in ignorance of said Plant's insolvency, suspension and bankruptcy and the court erred

by misconstruing the testimony of Findlay. His testimony on this point is as follows:

"Q. The papers and checks that were turned into the bank on May 13, 1904, among which was this check on the American National Bank of Nashville, you would not have declined any of those checks or papers, would—you just accepted whatever Mr. Plant sent in there as all right?"

"A. Do you mean that particular bunch of papers that was sent in that day?"

"Q. Yes, sir.

"A. Why, no; they were all sent in for credit. I would not decline anything that was tendered for credit.

"Q. The \$12888 of discounts that went to make up that deficit, you would not have declined that either?"

"A. No, not if he tendered them. I would not have declined them."

The court construed this to mean that "paper received for the purpose of credit was general credit by the bank irrespective of any such custom, under a general habit to credit whatever a man would send for the purpose of credit."

14. The court erred in instructing a verdict for plaintiff, because there was no evidence to support a verdict in favor of plaintiff.

15. The court, undertaking to find all the material facts in the case, erred in this, it failed to find a number of relevant facts as set forth in the ground assigned in the motion for a new trial.

16. The court erred in holding and charging that the knowledge of Plant of his own insolvency, and his indebtedness to defendant, could not be imputed to the First National Bank.

17. The court erred in holding that the case had been taken from the jury and the duty imposed on the court of making a special finding of facts, because each of the parties had moved the court for a peremptory instruction for a verdict in his or its favor. If the testimony did not warrant and require peremptory instruction for a verdict in defendant's favor, it at least demanded a submission of the issues of fact to the jury, and the court erred in not so doing.

18. If the duty of finding the facts devolved on the court, it erred in not finding that said R. H. Plant, as manager of said First National Bank, had a long-standing arrangement and understanding with the cashier and other subordinate employees of the bank that the bank was to receive whatever commercial paper or checks he, or the cashier of I. C. Plant's Sons Bank might send to the First Na-

tional Bank for discount or for credit on indebtedness due from him, or from I. C. Plant's Sons Bank, to said First National Bank; that it had been the custom of the bank to receive without question such paper so sent for said purpose or purposes, and it had long been understood that the cashier or other officers of the bank had no discretion as to the reception of such paper, but must accept whatever was sent; that the fact that R. H. Plant was dictating the transactions of the bank, especially as to its dealings with himself and with his bank, was known the directors of the First National Bank, and that said arrangement, understanding and custom had continued down to, and including the time of the transaction in question; that the \$3,000 check in question was the check of said Plant, and, with a large amount of other paper, had been delivered by him, through the cashier of I. C. Plant's Sons bank, to the First National Bank as a means of payment of a large indebtedness which the said I. C. Plant's Sons Bank owed the First National Bank for carrying the clearing house balances of the said I. C. Plant's Sons Bank, and that no officer of said First National Bank, except said Plant himself passed upon the question whether said paper, including said check, should or should not be so received.

19. The court erred in instructing the jury to include in their verdict any interest on the \$3,000 check, because by so doing he instructed a verdict for an amount larger than the damages laid in the writ, the damages so laid being only \$3,000.

20. The court erred in rendering judgment against defendant for the costs of the cause.

John M. Gaut &
Jas. M. Pilcher,

Attorneys for American National Bank.

Endorsed: Filed March 28, 1910. H. M. Doak, Clerk
by F. B. McLean, D. C.

An order granting writ of error and supersedeas was entered, viz:

A. L. Miller, Agent,

vs.

American National Bank.

This 30th day of March, 1910, came the defendant by its attorney, and filed herein and presented to the court its petition, praying for the allowance of a writ of error, an assignment of errors, intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Cir-

cuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the defendant giving bond according to law in the sum of four thousand dollars, which shall operate as a supersedeas bond.

The following bond for writ of error and supersedeas was filed, viz :

Know all men by these presents, that we, the American National Bank, as principal, and W. W. Berry and A. H. Robinson, as sureties, are held and firmly bound unto the defendant in error, A. L. Miller, as agent of the first National Bank of Macon, Georgia, in the full and just sum of four thousand dollars, to be paid to the said defendant, A. L. Miller, Agent, etc., his certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 28th day of March, 1910.

Whereas lately at a Circuit Court of the United States for the Middle District of Tennessee, in a suit depending in said court between A. L. Miller, as agent of the First National Bank of Macon, Georgia, plaintiff and the American National Bank of Nashville, Tennessee, defendant, a judgment was rendered against the said American National Bank and said the American National Bank having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit and a citation directed to the said A. L. Miller, Agent, etc., citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the city of Cincinnati, Ohio, in said circuit, on the 9th day of May, 1910, next.

Now the condition of the above obligation is such, that if the said American National Bank shall prosecute its writ of error to effect and answer all damages and costs if it fail to make said plea good, then the above obligation to be void; otherwise to remain in full force and virtue. Sealed and delivered in the presence of:

Jas S. Pilcher.

The American National Bank of Nashville, Tennessee,

By W. W. Berry, President, (Seal)

W. W. Berry, Surety, (Seal)

A. H. Robinson, Surety, (Seal)

Approved by:

Edward T. Sanford, Judge.

Endorsed: Filed Mch. 31, 1910. H. M. Doak, Clerk.

The following writ of error was issued, viz:

United States Circuit Court of Appeals for the Sixth Circuit.

United States of America, Sixth Judicial Circuit, ss.

The President of the United States, to the Honorable judges of the Circuit Court of the United States for the Middle District of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in said Circuit Court, before you or some of you, between A. L. Miller, Agent of the First National Bank of Macon, Georgia, plaintiff, and the American National Bank of Nashville, Tennessee, a manifest error hath happened, to the great damage of the said American National Bank, as by its complaint appears. We being willing, that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 9th day of May, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of April, 1910, and of the independence of the United States the 134th year.

H. M. Doak,

Clerk of the Circuit Court of the United States for the Middle District of Tennessee.

Allowed by Hon. E. T. Sanford, Judge.

The following citation was issued, viz:

United States Circuit Court of Appeals for the Sixth Circuit.

United States of America, Sixth Judicial Circuit, ss.

To A. L. Miller, Agent, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati.

nati, in said Circuit, on the 9th day of May, 1910, next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Middle District of Tennessee, wherein the American National Bank of Nashville, Tennessee, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this the 11th day of April, in the year 1910, and of American independence the 134th year.

Edward T. Sanford, Judge.

I, H. M. Doak, clerk of the Circuit Court of the United States for the Middle District of Tennessee, hereby certify that the foregoing is a true, perfect and complete copy of the record in the above styled cause, as the same is on file or of record in my office. In witness whereof I have hereunto signed my name and affixed the seal of the court, at my office at Nashville, State of Tennessee, this the 12th day of April, 1910.

(Seal)

H. M. Doak, Clerk.

And afterwards to wit on May 13, 1910, a præcipe for appearance of counsel was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

2060.

AMERICAN NATIONAL BANK OF NASHVILLE, TENN.,

vs.

A. L. MILLER, Agent.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the appellant.

JOHN M. GAUT.

And afterwards to wit on August 5, 1910, a stipulation to correct the record was filed which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

At Law. No. 2060.

AMERICAN NATIONAL BANK OF NASHVILLE, TENN., Plaintiff in Error,

vs.

A. L. MILLER, Agent, Defendant in Error.

Stipulation of Attorneys.

It is agreed by the attorneys for the plaintiff in error and the attorneys for the defendant in error that the following errors and omission appearing in the printed record filed in the above entitled cause shall be corrected and supplied by Frank O. Loveland, Clerk of the Court, viz:

1. On page 103 of the record immediately after the paragraph which concludes with the sentence "This was all of the testimony presented to the Court and jury in this cause." shall be inserted the following paragraph:

"Plaintiff's counsel then renewed their motion for peremptory instructions."

2. Also on page 103 of the record, near the bottom thereof, the paragraph which now reads as follows: "Plaintiff's counsel then moved the Court for peremptory instructions to the jury instructing them to find a verdict for the defendant (sten. rep. 50-50½)" shall be corrected so as to read as follows: "Defendant's counsel then moved the Court for peremptory instructions to the jury instructing them to find a verdict for the defendant (sten. rep. 50-50½)."

Executed in triplicate this 3rd day of August, 1910.

JOHN M. GAUT,

Attorney for Plaintiff in Error.

BAXTERS,

Attorneys for Defendant in Error.

And afterwards to wit on January 10, 1911, an entry was made upon the Journal of said Court which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2060.

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE,

vs.

A. L. MILLER, Agent.

Before Severens, and Knappen, C. JJ., and Denison, D. J.

This cause is argued by Mr. John M. Gaut for the plaintiff in error and by Mr. Sloss Baxter for the defendant in error, and is continued until tomorrow for further argument.

And afterwards to wit on January 11, 1911, an entry was made upon the Journal of said Court clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE,

vs.

A. L. MILLER, Agent.

This cause is submitted to the Court without further oral argument.

And afterwards to wit on March 7, 1911, judgment was entered in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

2060.

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE,

vs.

A. L. MILLER, Agent.

Error to the Circuit Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Middle District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause be and the same is hereby affirmed with costs.

And afterwards to wit on March 16, 1911, an opinion was filed in said cause which reads and is as follows:

Opinion.

Filed Mar. 16, 1911. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2060.

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, Plaintiff in Error,

vs.

A. L. MILLER, Agent, Defendant in Error.

Error to the Circuit Court of the United States for the Middle District of Tennessee.

Submitted January 11, 1911; Decided March 7, 1911.

Before Severens and Knappen, Circuit Judges, and Denison, District Judge.

KNAPPEN, *Circuit Judge*, delivered the opinion of the Court:

The defendant in error (hereafter called the plaintiff) sued the plaintiff in error (hereafter called the defendant) for the recovery of a deposit of \$3,000.00 made in the defendant bank by the First National Bank of Macon, Georgia, of which bank the plaintiff has been duly appointed agent under the provisions of the national banking act. There was a trial by jury. At the conclusion of the testimony counsel for each party asked the court for direction of verdict in favor of such party. The court thereupon proceeded to find the facts and instruct the jury as to their verdict. The facts so found, as supplemented by the "stipulation of agreed facts" presented in open court by counsel for the respective parties, and by the undisputed evidence, are, so far as material for present purposes, substantially these:

On May 14, 1904, R. H. Plant was a large stockholder in, as well as the president and general manager of, the First National Bank of Macon, Georgia (hereafter called the Macon National Bank), and controlled the policy and management of that bank. He was at the same time the proprietor of a private bank doing business at Macon under the name of "I. C. Plant's Son's Bank." Of this latter bank one Hurt was cashier and general manager. Hurt was also a director and a member of the finance committee of the Macon National Bank. On the date named Plant was insolvent and knew it. He was at the time indebted to the Macon National Bank in a large amount on account of clearing house balances. The Macon National Bank, as well as Plant individually, kept open deposit accounts with the defendant bank, Plant having on the date named more than \$3,000

therein to his individual credit. At the same time he owed the defendant bank \$50,000 upon time drafts to his own order, maturing after May 16th, "drawn upon and accepted by R. H. Plant doing a banking business under the name of I. C. Plant's Sons' Bank," and endorsed to the defendant for value. On the day named (or the day preceding) Plant drew his check on the defendant bank in favor of the Macon National Bank for \$3,000 and delivered the same, through Hurt, to the Macon National Bank, together with certain other financial items, for the purpose of discharging a large indebtedness to the latter bank on account of clearing house transactions. When this check was drawn and delivered Plant was not at the Macon National Bank, but had been absent therefrom for several weeks on account of his own sickness, although "in frequent if not daily communication with the officers of the bank." The Court found that Plant "gave no specific directions in reference to this particular check to the officers of the First National Bank who were conducting his affairs during his sickness;" that it was "a general custom in the (Macon National) bank to accept and discount any paper that he (Plant) might send to them and to credit upon his account any paper that he might send for the purposes of credit, but that paper received for the purpose of credit was generally credited by the bank irrespective of any such custom under the general habit to credit whatever a man would send for the purpose of credit." The check in question was forwarded by the Macon National Bank to the defendant bank on Saturday, May 14th, for deposit, with instructions to place the same to the credit of the former bank. The defendant bank received the check on Monday morning, May 16th, and pursuant to instructions credited the amount to the Macon National Bank and charged the same to Plant's account, notifying the Macon National Bank of this credit by advice by the night's mail of that day. Plant's private bank did not open its doors on the morning of May 16th. A notice of its closing was posted upon its doors, and was seen by the cashier of the Macon National Bank as early as nine o'clock. At about 9:30 a. m. the Macon National Bank closed its doors, being insolvent. At about 11:45 A. M. of that day a petition in involuntary bankruptcy was filed against Plant. When the check was forwarded to the defendant bank by the Macon National Bank, the latter's officers who were conducting its affairs had no knowledge of Plant's approaching bankruptcy or even of his insolvency, and no knowledge of his indebtedness to the defendant bank, nor did they have knowledge of such indebtedness at the time the defendant bank credited the check to the Macon National Bank. Whether the actual credit was given the Macon National Bank before or after the filing of the petition in bankruptcy against Plant does not definitely appear either from the findings or stipulation of agreed facts, or the undisputed testimony. The Macon National Bank did not advise the defendant bank by wire or otherwise of Plant's insolvency or of the bankruptcy proceedings against him. On May 25th the defendant bank credited back the \$3,000 check to Plant's individual account, charging the same to the Macon National Bank (then in the hands of a receiver), upon the ground

that it had the right to offset Plant's deposit account against the indebtedness upon the accepted drafts. There was due demand for the payment of the deposit to the representative of the Macon National Bank, which demand was refused. The court instructed the jury that Plant's knowledge of his own insolvency and of his debt to the defendant bank was not imputable to the Macon National Bank; that there was no breach of duty on the part of the Macon National Bank in not advising the defendant bank of Plant's insolvency at the time of forwarding the check, nor any breach of duty in not communicating to the defendant bank the fact of Plant's embarrassed condition after the officers of the bank other than Plant learned of it; that the check had been in fact paid by crediting the same to the Macon National Bank, and that the defendant bank had no authority to reverse the entries and withhold the amount of the deposit. The jury was accordingly instructed to render verdict for \$3,000, with interest from the date suit was brought. There was verdict and judgment accordingly. The defendant excepted to the instruction to find for the plaintiff "in any amount," as well as to the instruction to include interest in the verdict. A motion for new trial was overruled and this writ of error is brought to review the judgment.

The defendant insists that the trial judge erred in construing the request of counsel for both parties for a directed verdict as a request that the court find the facts. Setting to one side the question whether the right to raise this question has been reserved by appropriate exception, it is clear that the request by each party for peremptory instruction in its favor, unaccompanied by request for specific instruction in case the request for a directed verdict be denied, amounts to an admission by both parties that the evidence is not in conflict and to a request that the court determine the facts. *Bentell v. Magone*, 157 U. S. 154, 157; *Anderson v. Messenger* (C. C. A. 6) 158 Fed. 250, 253. There was in this case no request for specific instruction in case the request for directed verdict was denied. The case is thus distinguished from *Minahan v. Grand Trunk W. Ry. Co.* (C. C. A. 6) 138 Fed. 37, 42; *Empire State Cattle Co. v. Atchison, Etc. Ry. Co.*, 210 U. S. 1, 8; *Farmers & Merchants Bank v. Maines* (C. C. A. 6) 183 Fed. 37, 41. The court was not, however, required, in our opinion, to make formal findings of fact.

We are thus limited on this review to the considerations whether there is substantial evidence sustaining the conclusions reached by the trial court, and whether such conclusions support the verdict, subject, perhaps, to the limitation that the verdict should not stand as against undisputed evidence inconsistent therewith.

Assuming, for the purposes of this opinion, that the defendant bank had the right, as between it and Plant (or one standing in the latter's shoes), upon the discovery of Plant's insolvency to rescind the transaction and so avail itself of the right to set off the deposit in question against Plant's debt to the defendant, it is clear that the Macon National Bank does not necessarily stand in Plant's shoes. The check being genuine, and having been offered as a deposit and received as a deposit, the transaction amounted to a pay-

ment of the check to the same extent as if the check had been actually paid in cash to the one presenting it and the cash in turn deposited in the account of the one so collecting the check. The transaction is thus complete, and cannot be rescinded except for fraud or in case of mutual mistake. *National Bank v. Burkhardt*, 100 U. S. 686, 689; *Montgomery County v. Cochran* (C. C. A. 5) 126 Fed. 456, 460; *Riverside Bank v. National Bank* (C. C. A. 2) 74 Fed. 276, 278, and cases there cited. If, therefore, the circuit court correctly held that the Macon National Bank was not bound by Plant's knowledge of his own insolvency and his indebtedness to the defendant bank, nor in default for not advising the defendant bank of Plant's embarrassed condition at the time it became known to the officers of the Macon National Bank who were then in personal charge of its affairs, it is evident that the plaintiff was entitled to a direction of verdict in its favor. The doctrine of mutual mistake does not apply. The defendant bank made a mistake, and by it lost the opportunity to exercise the option whether to pay the check, or to refuse it for the purpose of offsetting the deposit account against Plant's notes. Had the Macon National Bank known of Plant's insolvency, as well as his indebtedness to the defendant bank, it does not follow that the former bank would not have taken the check and presented it for payment, discharging Plant's indebtedness to it, to that extent, if and when payment should be made.

Coming to the question whether the Macon National Bank is bound by Plant's knowledge of his insolvency and of his indebtedness to the defendant bank, we may pass by the suggestion that (regardless of this question) the Macon National Bank was derelict in duty in failing to advise the defendant bank of Plant's embarrassed condition. We say this because the representatives of the Macon National Bank who were actively conducting its affairs had no knowledge of Plant's indebtedness to the defendant bank, and thus no occasion to consider the possible question of set off of Plant's deposit account. We may also pass by the suggestion made by defendant that the Macon National Bank was bound by Hurt's alleged knowledge of Plant's indebtedness to the defendant bank. Assuming that Hurt's relations to the Macon National Bank were such as to bind the bank by his knowledge, it is enough to say that it does not clearly appear by the record that Hurt had the knowledge referred to. Such knowledge is sought to be inferred from the fact that he must have known that the drafts which formed the basis of Plant's indebtedness to the defendant bank were outstanding because they were drawn on and accepted by Plant as heretofore stated. But this involves a conclusive presumption that the drafts were entered upon the books of I. C. Plant's Son's Bank. There is no testimony to this effect. On the other hand, it appears that the bookkeeping relating to Plant's personal affairs, including his account with the defendant bank, upon which the check in question was drawn, were kept upon his books at his business office, disconnected with either the private bank or the Macon National Bank. While the fact of the outstanding drafts may have appeared

upon the books of the private bank, and so have been known to Hurt, such fact does not expressly appear.

This brings us to the question whether the Macon National Bank was bound by Plant's knowledge of his own insolvency and of his indebtedness to the defendant bank. It is the general rule that the principal is held to know all that his agent knows in any transaction in which the agent acts for him. As said by Judge Taft, speaking for this court in *Thompson-Houston Elec. Co. v. Capitol Elec. Co.*, 65 Fed. at p. 343:

"This rule is said to be based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty."

To this general rule there are exceptions, among others, that the agent's knowledge is not that of the principal when the former is engaged in an attempt to defraud the latter. *Thompson-Houston Elec. Co. v. Capitol Elec. Co.*, supra; *Niblack v. Cosler* (C. C. A. 6) 80 Fed. 596, 600; *Yeiser v. United States Board & Paper Co.* (C. C. A. 6) 107 Fed. 340, 345. Nor is the agent's knowledge that of the principal when the interest or conduct of the agent is such as to make it certain he would not disclose his knowledge to his principal. *Bank of Overton v. Thompson*, (C. C. A. 8) 118 Fed. 798, 800, 801, and cases there cited. In accordance with this principle, the knowledge of the agent is not imputable to the principal where the agent is acting for himself in his own interest, adversely to his principal, because, first, in such case he would naturally act for himself rather than for his principal; and, second, he would not be likely to communicate to his principal a fact which he is interested in concealing. *Union Central Life Ins. Co. v. Robinson* (C. C. A. 5) 148 Fed. 358, 360. The interest of one dealing with the principal on his own business is adverse to the interest of the principal, and the presumption in such case is that he will not disclose anything detrimental to his own interest. *Levy & Cohn Mule Co. v. Kauffman* (C. C. A. 5) 114 Fed. 170, 176, 177. Therefore if the transaction is partly for the benefit of the agent, although the latter is representing, but not exclusively, the principal, there is no presumption that his information derogatory to his own right to transact such business will be communicated to his principal.

Louisville Trust Co. v. N. A. & C. R. Co. (C. C. A. 6) 75 Fed. 433, 469;

Levy & Cohn Mule Co. v. Kauffman, supra;

First Nat'l Bank v. Tompkins (C. C. A. 5) 57 Fed. 20.

It appears that on May 13th a National bank examiner was in the City of Macon examining another bank, and that on the 14th the examination of the First National Bank of Macon was begun. It is argued from this fact that Plant was acting solely in the interest of the bank in adjusting the clearing house balance referred to. There is no direct evidence that Plant in adjusting this balance was acting in the interest of the bank. On the other hand, it is manifest that he was at least equally interested in protecting himself,

and was at least equally acting in his own interest in the transaction in question. He was interested not only as president and a large stockholder in the Macon National Bank, but also as the sole owner of the private bank and as a heavy borrower from the Macon National Bank, being upon paper held by that bank to the amount of over \$500,000, nearly all by way of endorsement for various corporations with which he was actively connected and which he financed. All the interests mentioned would naturally be seriously injured by the failure of the Macon National Bank, and were thus all interested in Plant's ability to adjust the large clearing house balance due from Plant's private bank. Over \$2,000,000 of claims were proven against Plant's estate, largely on account of his endorsement upon paper of corporations which he represented. These conditions make it practically certain that Plant would not have disclosed to the First National Bank of Macon his own insolvency or the fact that his deposit account in the defendant bank was subject to be set off against a large indebtedness on his part to that bank. There is in this case no room for the application of the rule that the principal receiving the benefit cannot at the same time repudiate the agency, because of the adversary relation here existing and the fact that Plant was not even apparently acting solely in the interest of the bank. We think there is substantial evidence sustaining the findings of fact made by the trial judge, and that the latter support the conclusions of law reached by him, and that the undisputed evidence is not inconsistent with this conclusion. It follows that the Circuit Court did not err in directing a verdict for the plaintiff.

We are not called upon to consider questions of preference between the First National Bank of Macon and Plant's estate, which are subject to be worked out in the course of bankruptcy proceedings.

The objection to the inclusion of interest in the verdict seems to be based upon the fact that the summons claims but \$3,000 damages, and that the addition of interest increases the recovery beyond the ad damnum. The commencement of suit was properly treated as a demand for the deposit, and interest runs at least from the commencement of suit, as the time of such demand. *Kaufman v. Tredway*, 195 U. S. 271. Even were the objection technically good, which we do not decide, there is no merit in it. The declaration claimed interest in addition to the principal sum of \$3,000. The exception to the instruction regarding the interest did not point out the reason therefor. Had the court been advised of such reason, it would have been not only proper, but the duty of the Court to have permitted then and there an amendment of the ad damnum clause to meet the situation.

We find no prejudicial error in the record, and the judgment of the Circuit Court should accordingly be affirmed.

And afterwards to wit: on April 28, 1911, a petition for writ of error was filed in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

AMERICAN NATIONAL BANK OF NASHVILLE, TENN., Plaintiff in
Error,

vs.

A. S. MILLER, Agent of the First National Bank of Macon, Georgia,
Defendant in Error.

Petition for Writ of Error.

Your petitioner, The American National Bank of Nashville, Tennessee, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now impending in the United States Circuit Court of Appeals for the Sixth Circuit, and that a judgment has therein been rendered on or about the 16th day of March, 1911, affirming a judgment of the Circuit Court of the United States for the Middle District of Tennessee and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner would respectfully pray that a writ of error be allowed in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Sixth Circuit to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

J. S. PILCHER,
JOHN M. GAUT,
Attorneys for Petitioner.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of \$8,000.

HENRY F. SEVERENS,
Senior Circuit Judge.

Dated May 2, 1911.

And on the same day, to wit: on April 28, 1911, an assignment of errors was filed in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, Plaintiff in Error.

vs.

A. L. MILLER, Agent of the First National Bank of Macon, Ga.,
Defendant in Error.*Assignments of Error.*

The plaintiff in error, the American National Bank, in connection with its petition for a Writ of Error, makes the following assignment of errors which it avers occurred upon the trial of the cause in the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, to wit:

In said assignment of errors, hereinafter set forth, the plaintiff in error is called the defendant and the defendant in error is called the plaintiff and the United States Circuit Court of Appeals for the Sixth Circuit is called the Court of Appeals.

The Court of Appeals erred in the following particulars:

1. In not holding that the plaintiff has no right to maintain this suit, because there was a want of privity between the First National Bank and defendant, the acts relied on as establishing privity having been performed in ignorance of said Plant's insolvency, suspension and bankruptcy.

2. In deciding that the principle of mistake did not apply to this case, and in not deciding that inasmuch as the American National Bank credited the First National Bank with the \$3,000.00 check and charged R. H. Plant's account with it, and mailed its letter of advice, all in ignorance of the insolvency suspension and bankruptcy of R. H. Plant, and when it was supposed that said Plant was solvent and continuing in business, said American Bank was not precluded by these things from exercising its right of setoff.

3. In not holding that the First National Bank knew, before the contract of deposit of the \$3,000.00 check by the First National Bank in the American National Bank was complete, that R. H. Plant had suspended payment and suspended the transaction of business, thus committing a notorious act of insolvency, and knew that a petition in bankruptcy had been filed against him, and in not holding that said First National Bank had failed to act in good faith by not informing the American National Bank of such notorious insolvency, suspension and bankruptcy.

3a. In holding that the knowledge of R. H. Plant of his own insolvency and of his indebtedness to the American National Bank could not be regarded as knowledge on the part of the First National Bank.

3b. In not holding that Mr. Hurt knew of the indebtedness of Mr. R. H. Plant to the American National Bank and that his knowledge amounted to knowledge on the part of the First National Bank.

3c. In misconstruing the testimony of Findlay. His testimony on this point is as follows:

"Q. The papers and checks that were turned into the Bank on May 13, 1904, among which was this check on the American National Bank of Nashville, you would not have declined any of those checks or papers, would — you just accepted whatever Mr. Plant sent in there as all right?

"A. Do you mean that particular bunch of papers that was sent in that day?

"Q. Yes, sir.

"A. Why no; they were all sent in for credit, I would not decline anything that was tendered for credit.

"Q. The \$12,888 of discounts that went to make up the deficit, you would not have declined that either?

"A. No, not if he tendered them; I would not have declined them."

The court construed this to mean that "paper received for the purpose of credit was generally credited irrespective of any such custom, under a general habit to credit whatever a man would send for the purpose of credit." The Court of Appeals erred in not holding that the Circuit Court was in error in this respect, and that the true construction of the language of the witness and his meaning was that he would not have declined anything that was tendered for credit by R. H. Plant.

3d. If the duty of finding the facts devolved upon the Circuit Judge, the Court of Appeals erred in not finding that the trial Judge was in error in not finding, upon the unconflicting testimony, that said R. H. Plant, as manager of the said First National Bank, had a long-standing arrangement and understanding with the cashier and other subordinate employes of the bank that the bank was to receive whatever commercial paper or checks he, or the cashier of I. C. Plant's Sons Bank, might send to the First National for discount or for credit on indebtedness due from him, or from I. C. Plant's Sons Bank, to said First National Bank; that it had been the custom of the bank to receive without question such paper so sent for said purpose or purposes, and it had long been understood that the cashier or other officers of the bank had no discretion as to the reception of such paper but must accept whatever was sent; that the fact that R. H. Plant was dictating the transactions of the bank, especially as to its dealings with himself and with his bank, was known to and acquiesced in by the directors of the First National Bank and that said arrangement, understanding and custom had continued down to, and including the time of the transaction in question; that the \$3,000 check in question was the check of said Plant, and, with a large amount of other paper, had been delivered by him, through the cashier of I. C. Plant's Sons Bank, to the First National Bank as a means of payment of a large indebtedness which the said I. C. Plant's Sons Bank owed the First National Bank for carrying the clearing house balances of the said I. C. Plant's bank, and that no officer of said First National Bank, except said Plant himself passed upon the question whether said check, should, or should not be received, but that the same was sent by Plant through

Hurt to the bank under said arrangement, understanding and custom, and was so received by it.

4. In affirming the action of the Circuit Court and holding that the dual request for a directed verdict had the effect of taking the case from the jury and imposing upon the trial Judge, the duty of finding the facts and in not deciding that having declined to direct a verdict for the defendant it was the duty of said trial Judge to have submitted the issues of fact to the jury.

5. In not holding that the Circuit Court erred in directing a verdict for the plaintiff: There was no evidence to support a verdict for the plaintiff.

6. In not holding that the trial Judge should have directed a verdict for the defendant. The testimony demanded such direction.

7. In affirming the judgment and rendering judgment against the defendant for the costs.

J. S. PILCHER,
JOHN M. GAUT,

Attorneys for Plaintiff in Error.

And on the same day, to wit on May 3, 1911, a bond on writ of error was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

Know All Men By These Presents, That we, The American National Bank of Nashville, Tennessee, a corporation existing under the laws of the United States, as principal, and W. W. Berry and A. H. Robinson, as sureties are held and firmly bound unto A. L. Miller, Agent of the First National Bank of Macon, Georgia, in the full and just sum of Eight Thousand Dollars, to be paid to the said A. L. Miller, Agent, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of — in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a United States Circuit Court of Appeals for the Sixth Circuit, in a suit depending in said Court, between The American National Bank of Nashville, Tennessee, Plaintiff in Error, and A. L. Miller, Agent of the First National Bank of Macon, Ga., a judgment was rendered against the said The American National Bank, and the said American National Bank having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said A. L. Miller, Agent, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The American National Bank of Nashville, Tenn., shall prosecute said writ of error to effect, and answer all damages and costs if

it fail to make its plea good, then the above obligation to be void;
else to remain in full force and virtue,

THE AMERICAN NATIONAL BANK,

By N. P. LESUER, *Cashier*.

W. W. BERRY, *Surety*.

A. H. ROBINSON, *Surety*.

Scaled and delivered in the presence of

F. W. CARR,

W. H. ARNISTEAD.

Approved by

HENRY F. SEVERENS,

Senior Circuit Judge, Sixth Judicial Circuit.

May 2nd. 1911.

AMERICAN NATIONAL BANK. Plaintiff in Error,

vs.

A. L. MILLER, Agent, Defendant in Error.

In the matter of a writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Sixth Circuit in the above entitled cause on this 26th day of April, 1911, before me, H. M. Doak, Clerk of the United States Court at Nashville, Tennessee, in the Middle District of Tennessee, this day personally appeared W. W. Berry, President, and A. H. Robinson, Vice President of said Bank, who propose to become sureties on the bond in the matter of said writ of error, and severally made oath in due form of law that they are each worth more than \$10,000.00 in property subject to execution, over and above all liability and exemptions.

W. W. BERRY.

A. H. ROBINSON.

Sworn and subscribed to before me, this 26th day of April, 1911.

[SEAL]

H. M. DOAK.

Clerk U. S. Circuit Court.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between American National Bank of Nashville, Tennessee, plaintiff in error, and A. S. Miller, Agent of First National Bank of Macon, Georgia, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears. We being willing that

error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all — concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 2nd day of May, in the year of our Lord one thousand nine hundred and eleven.

[Seal of the Circuit Court, Southern Dist. of Ohio.]

B. E. DILLEY,

Clerk U. S. Circuit Court, S. D. O.

[Endorsed:] No. 2060. United States Circuit Court of Appeals, Sixth Circuit. American National Bank of Nashville, Tenn., vs. A. L. Miller, agent. Writ of error. Filed May 3, 1911. Frank O. Loveland, Clerk.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to A. L. Miller, Agent of the First National Bank of Macon, Georgia, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein The American National Bank of Nashville, Tennessee, is Plaintiff in error, and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Justice of the Supreme Court of the United States, this 2nd day of May in the year of our Lord one thousand nine hundred and eleven.

HENRY F. SEVERENS,

Senior Circuit Judge, 6th Jud. Circuit.

Copy of Writ served on me this 4 day of May, A. D. 1911.

SLOSS D. BAXTER,

Counsel for A. L. Miller, Agt.

[Endorsed:] Citation.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings and the original writ of error and citation in the case of American National Bank vs. A. L. Miller, Agent, No. 2060, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 4th day of May, A. D. 1911.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court of
Appeals for the Sixth Circuit.*

October Term, 1911.

No. 656.

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, Plaintiff in
Error,

vs.

A. L. MILLER, Agent, etc., Defendant in Error.

It is agreed by counsel for both sides that the Clerk of this Court use the printed copies of the transcript of the record printed and filed in the United States Circuit Court of Appeals for the Sixth Circuit in this cause, as corrected under stipulation of counsel, in making the record in this Court, and that he have printed and securely affixed thereto, true and complete copies of all proceedings and record entries, including the opinion of said Court of Appeals, made and entered in said latter Court.

It being understood that the receipts of counsel hereto of printed copies of said proceedings and record entries from said Court of Appeals, shall be in lieu of their right to copies of regularly printed transcripts of the record.

But nothing herein is to be understood as in any manner to effect the right of the Clerk of this Court to his usual supervision fee for the supervising of the printing of such records.

This 21st day of July, 1911.

JOHN J. VERTREES,
Attorney for Plaintiff in Error,
By JOHN M. GAUT.
SLOSS D. BAXTER,
Attorney for Defendant in Error.

[Endorsed:] File No. 22,732. Supreme Court U. S. October Term, 1911. Term No. 656. The American National Bank of Nashville, Tenn., Plff in Error, vs. A. L. Miller, Agent, &c. Stipulation as to printing record, &c. Filed July 24th, 1911.

Endorsed on cover: File No. 22,732. U. S. Circuit Court of Appeals, 6th Circuit. Term No. 325. The American National Bank of Nashville, Tennessee, plaintiff in error, vs. A. L. Miller, agent of the First National Bank of Macon, Georgia. Filed June 12, 1911. File No. 22,732.

FILE COPY.

Supreme Court of the United States

OCTOBER TERM, 1911

Office Building Court, U. S.

FILED

325
No. 325

SEP 18 1911

JAMES D. McKENNEY,

CLERK.

**AMERICAN NATIONAL BANK, OF
NASHVILLE, TENNESSEE,**

Plaintiff in Error.

vs.

A. L. MILLER, AGENT, ETC.,

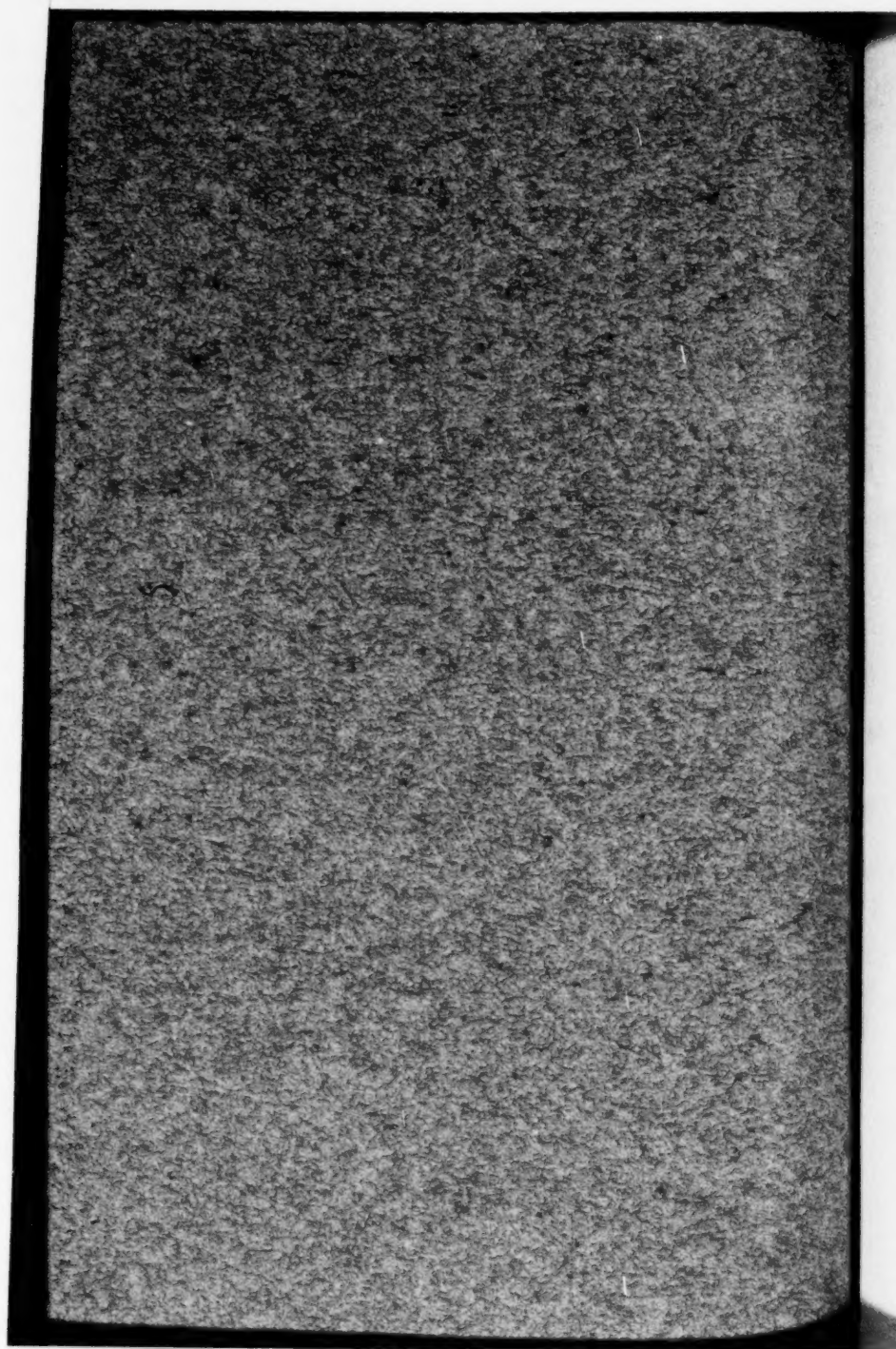
Defendant in Error.

**IN ERROR TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE
SIXTH CIRCUIT.**

**JOINT MOTION IN REGARD TO PRINTING THE
RECORD IN THIS CAUSE.**

JOHN J. VERTREES,
Attorney for Plaintiff in Error.

GLOSS D. BAXTER,
Attorney for Defendant in Error.



Supreme Court of the United States

OCTOBER TERM, 1911.

No. 656.

AMERICAN NATIONAL BANK, OF
NASHVILLE, TENNESSEE,
Plaintiff in Error,

vs.

A. L. MILLER, AGENT, ETC.,
Defendant in Error.

Come now the Plaintiff in Error, by its attorney, and also the Defendant in Error, by his attorney, and move the Court for leave to supply the Clerk with sixteen copies of the record in this cause, as printed for the use of the Court of Appeals, instead of twenty-five copies thereof, as required by the rules of this Court; and, that the Clerk be authorized to accept and use said sixteen copies for the purpose of having the record printed for this Court, counsel hereby waving their rights to any of said copies.

The grounds for said motion are:

FIRST—Because there remains only sixteen copies of the record used in the Circuit Court of Appeals, excepting two, one copy for each side.

SECOND—Because if the rules governing the printing of records be strictly applied and the Clerk be required to have an entirely new record printed, a further delay to this already old cause of nearly twelve months will be necessitated thereby and an exceedingly greater amount of money added to the cost of this litigation.

THIRD—Because all possible delay should be especially avoided in this cause, owing to the fact that it would cause a further postponement of a final settlement of the affairs of a banking corporation, the stockholders of which the defendant in error is agent.

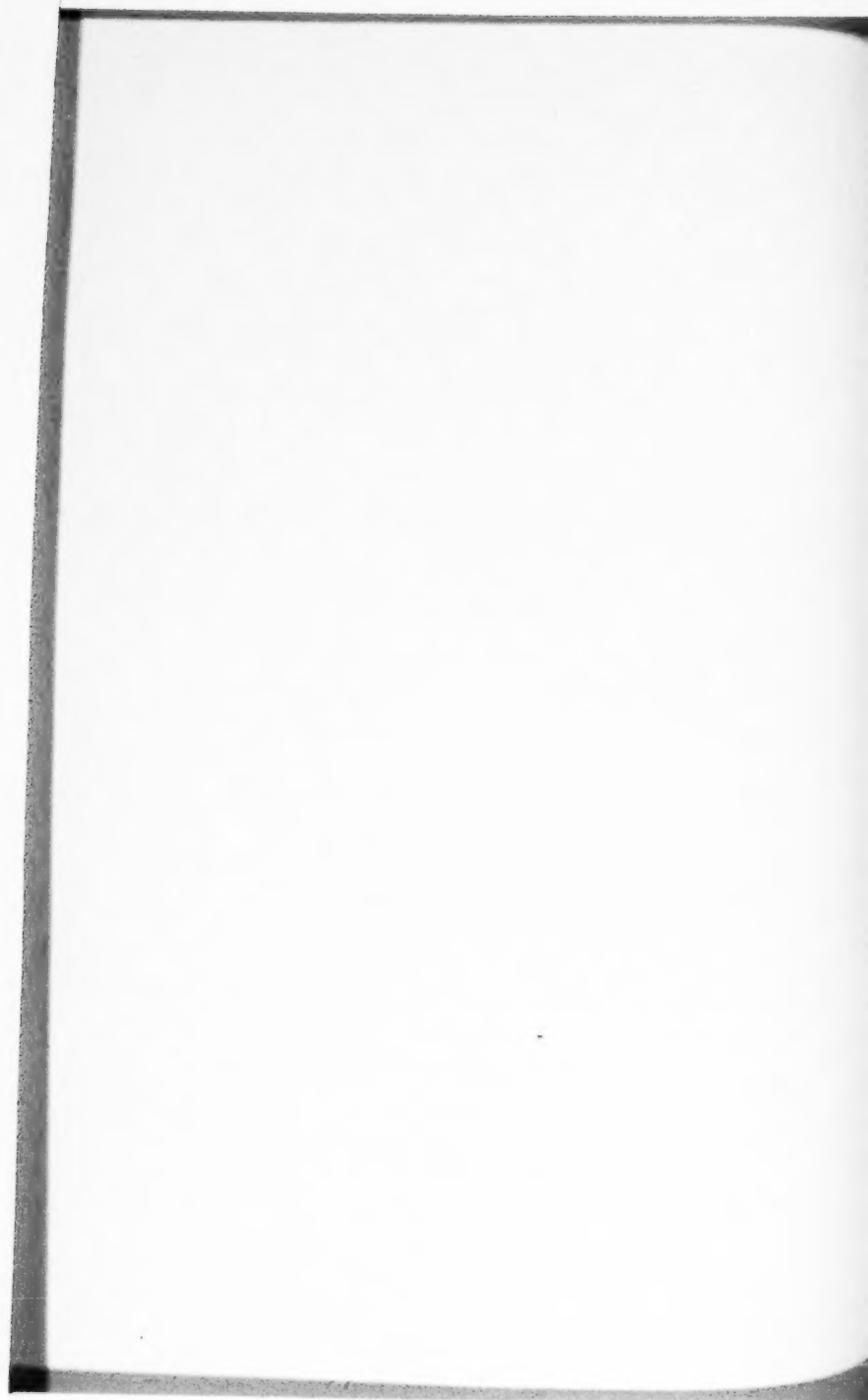
John A. Vertrees
By John M. Gaugh

Attorney for Plaintiff in Error.

James Baxter

Attorney for Defendant in Error.





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**IN THE SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM 1912

NO. 325

THE AMERICAN NATIONAL BANK

of Nashville, Tenn.

Plaintiff in Error

vs

A. L. MILLER, Agt., of FIRST NATIONAL BANK

of Macon, Ga.

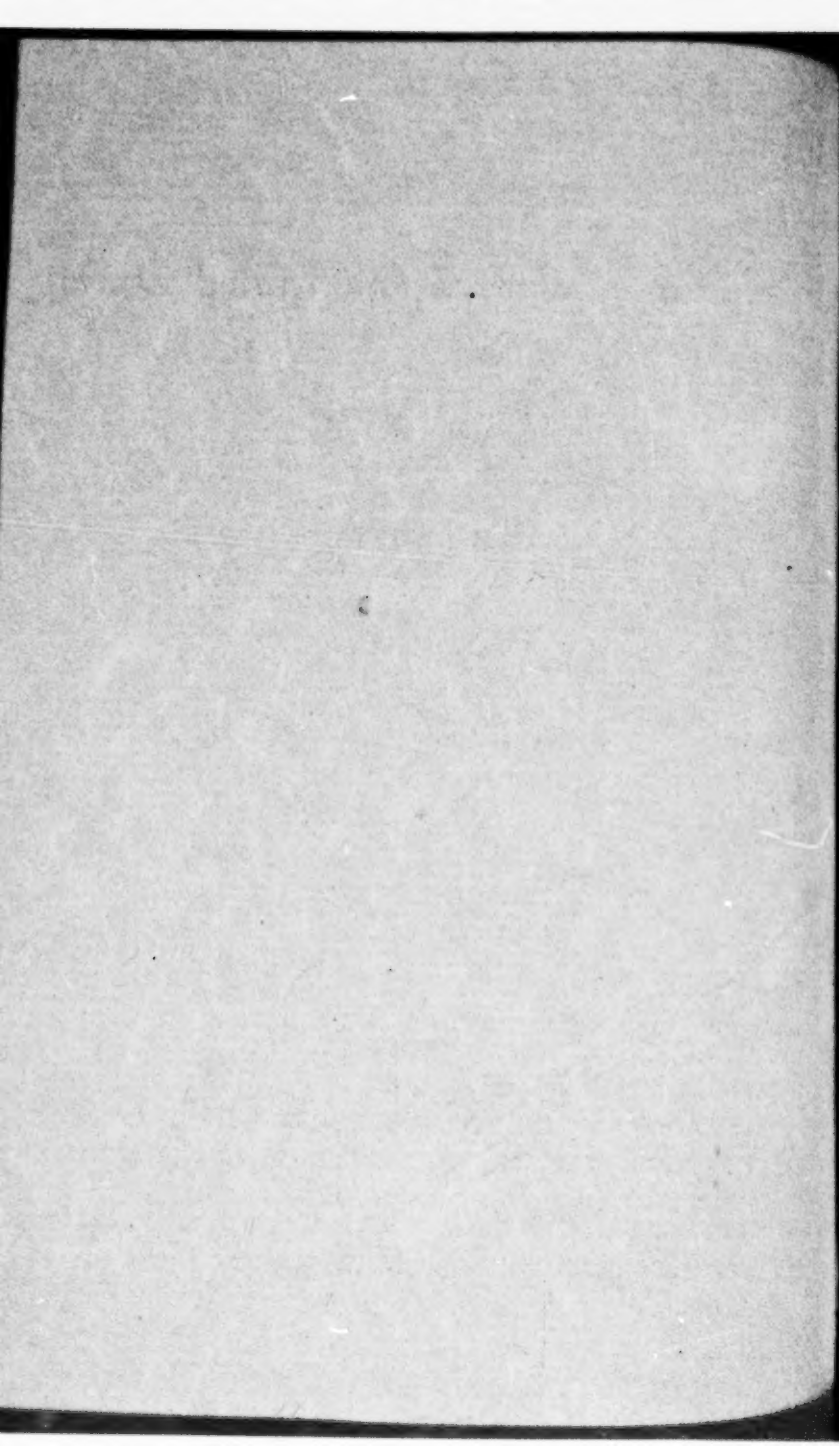
Defendant in Error

**In Error to the United States Circuit Court of Appeals
for the Sixth Circuit**

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

**J. S. PILCHER,
JOHN M. GAUT,**

Attorneys for Plaintiff in Error.



Copied in 325

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IN THE
Supreme Court of the United States

**THE AMERICAN NATIONAL BANK
OF NASHVILLE, TENN.,
PLAINTIFF IN ERROR,**

VS

A. L. MILLER, AGENT, DEFENDANT IN ERROR

STATEMENT OF THE CASE.

This suit arises out of a situation existing, and transactions which took place, on May 14th, 1904, and some days thereafter. On that date, and for years prior thereto, R. H. Plant was, and has been, a citizen of Macon, Ga., and was supposed to be a man of great wealth; was carrying on a large and varied business in that city and elsewhere, said business being conducted in distinct separate departments. As part of his business he was conducting a private bank, unincorporated, in the city of Macon under the name of I. C. Plant's Sons' Bank. While he was

the sole owner of the bank, it had its cashier and was running as a regular bank, being a member of the Clearing House of that city.

The First National Bank of Macon, Ga., was a bank existing under the Acts of Congress, and of this institution Plant was a large stockholder, a director, its President, and its General Manager. The American National Bank, the plaintiff in error in this case, was located at Nashville, Tennessee. R. H. Plant was a regular depositor in that bank, and the bank from time to time discounted his paper. On May 14th, 1904, he had to his credit in the American National Bank more than \$3,000.00, and it held his discounted paper to the extent of fifty thousand (\$50,000.00) dollars

On the 14th of May, 1904, R. H. Plant was indebted to the First National Bank of Macon, Ga., largely more than \$3,000.00, and on that date, it being Saturday, he drew a check for \$3,000.00 and delivered it to the First National Bank in part payment of his indebtedness to it. The First National Bank forwarded this check to the American National Bank for deposit. The letter enclosing the check was received by the American National in the morning's mail on Monday, May 16, but was not acted on in any way until later in the day. Some time, not earlier than eleven o'clock a.m., the check passed to the general bookkeeper, who credited it to the First National Bank. In the afternoon of that day, after three o'clock, the check was charged to Plant's account, and some time about five o'clock or later a letter of

advice was mailed, informing the First National that the check had been credited to it.

It turned out that when Plant drew his check and delivered it he was hopelessly insolvent. His private bank was never opened again. On Monday, May 16th, about twenty minutes before nine o'clock, there was posted on the door of his banking house a notice that the bank was suspended and would not be opened. The First National Bank was in the same building with Plant's private bank, with a door opening between the two apartments which they respectively occupied. The Cashier of the First National Bank learned of the suspension of Plant's Private Bank a few minutes after nine o'clock.

At forty-five minutes past eleven o'clock a.m. of May 16, a petition in bankruptcy was filed in the District Court at Macon against Mr. Plant. His regular assets paid only about ten cents on the dollar. The check was not otherwise paid than by these book entries. At the time these entries were made and the letter of advice mailed, the American National Bank had no knowledge whatever of the state of notorious insolvency of Mr. Plant, nor of his suspension and bankruptcy, and did not learn of these facts until the next day. As soon as it did learn of them, it charged the First National Bank with the amount of the check and credited R. H. Plant's account and applied the \$3,000.00 as a set-off on Plant's indebtedness to it, and by mail informed both Plant and the First National of its action and returned the check to the latter. The First National was found to

be insolvent and went into the hands of a receiver, and Miller, the defendant in error, brought this suit to recover that amount, which the American National Bank refused to pay. The National Banking Act authorizes the appointment of an agent only after the debts are paid.

On the trial of the case before the jury, the plaintiff read in evidence the stipulation which had been entered into and rested his case. The defendant then introduced proof to sustain its defense. At the close of the defendant's proof the plaintiff's counsel stated to the Court that they would like to ask, before they put in any proof in "rebuttal, for peremptory instruction, and that whatever proof in rebuttal was submitted for plaintiff would be subject to this motion." The Court stated that he "would hear the motion, but would not act on it, and that plaintiff might introduce his rebuttal testimony and he would act on the motion as of the time it was made." (Tr., 83.) Plaintiff then introduced his rebuttal testimony, when his counsel "renewed their motion for peremptory instructions." (Tr., 103.) The defendant then moved the Court for peremptory instructions to the jury, instructing them to find a verdict for the defendant. (Tr., 103.) Then the following took place: "Plaintiff's counsel moved the Court to take the case and consider it on the testimony. (Tr., 103.) It was then insisted by plaintiff's counsel that the two motions were tantamount to taking the case away from the jury or is a demurrer to the evidence. Plaintiff's counsel then stated that their motion was to direct a verdict in favor of the

plaintiff for \$3,000.00, with interest from May 24th, 1904, the date the check was charged back." (Tr., 103.)

After argument of counsel, the Court decided that it was his duty "to find the facts and give the jury peremptory instructions as to the verdict which they shall return." (Tr., 104.) He then proceeded to make an elaborate finding of the facts, in several instances passing upon "the weight of the evidence," and continued by saying to the jury that "on these facts I charge you as a matter of law," etc., stating several propositions of law (p. 106), and concluded with an instruction to find a verdict for the plaintiff for \$3,000.00, with interest from the bringing of the suit. The defendant moved the Court for a new trial, which motion was overruled. The defendant then took a writ of error from the Circuit Court of Appeals. This Court, passing on the facts, as found and "as supplemented by the stipulation of agreed facts and the undisputed evidence," affirmed the judgment.

Writ of error was then taken from this court.

BRIEF.

1. The American National Bank, at the time when it made the book entries and mailed the letter of advice, was in total ignorance of Plant's insolvency, suspension and bankruptcy. (Tr., 71, 80.)

2. Having acted under mistake of fact, that bank had the right, as between itself and Plant or any one

standing in his shoes, to revoke the book entries and make the set off.

Re Far. & Mechan. Bk., 13 Fed., 361.

Re Dickinson, 5 B. R., 483.

Un. Nat. Bk. v. McKay, 102 Fed., 662.

Kelley v. Solare, 9 Meeson & Welsby, 54.

Bell v. Gardner, 4 Man. & Gran., 10.

French v. DeBow, 38 Mich., 708.

Noble v. Doughten, 72 Kan., 336.

3. The American Bank also had the right, as between itself and the First National, to revoke the book entries on the ground of mistake. The latter bank, having given no value for the check, and suffered no injury by its reception, the equities of the former were superior.

Guild v. Baldrige, 2 Swan (Tenn.), 295.

Bank of Repub. v. Baxter, 31 Vermont, 101.

Cyc. of Law & Proceed., Vol. 5, 542b.

The check not payment, but only means of payment. (Tr.)

4. It was a wrong upon the American Bank for Plant, in his condition of insolvency, to have drawn and delivered the check, and especially wrong, after his act of notorious insolvency, not to have notified that bank of the fact.

Kerr on Fraud and Mistake, 109.

Mitchell v. Warden, 20 Barb., 253.

Pegulus v. Taylor, 38 Barb., 375.

Choffer v. Fort, 2 Lansing, 81.

Sharkey v. Mansfield, 90 N. Y., 227.

5. If the First National knew of his state of insolvency, and especially of either one of his notorious acts of insolvency, at any time before the contract and act of deposit was consummated, it was *particeps criminis* in not informing the American National of such insolvency.

Peterson v. Un. Nat. Bk., 52 Penn., 206 (91 Amer. Dec., 146).

6. The First National, independent of any imputation to it of Plant's knowledge, did know of the notorious act or acts of insolvency before the contract of deposit was consummated.

Check credited to First National not before 10:30 a.m.; probably not before 11 a.m. (Tr., 74 and 75.)

Check not charged to Plant until after 3:30 p.m. (Tr., 75.)

Letter of advice not mailed till after four o'clock p.m. (Tr., 75.)

Notorious insolvency known to First National prior to 9 o'clock a.m. (Tr., 24, 25, 106 top.)

The bankruptcy became known to it about the time it took place. Finding of the trial judge. (Tr., 106.)

Contract of deposit not consummated till letter of advice mailed. Bank v. Yardley, 165 U. S., 646; Bank of Rep. v. Baxter, 31 Vermont, 101.

7. It was the duty of the First National to have

informed American National of the notorious insolvency and bankruptcy as soon as it learned of the same, that the latter might not further deal with Plant's check as the check of a solvent man, and this duty existed, whether it knew of Plant's indebtedness to the American Bank or not.

8. The First National, at the time it received the check, knew of this indebtedness of Plant to the American by the imputation of Plant's knowledge.

St. Louis, etc. R. Co. v. Johnston, 133 U. S., 566.

9. This doctrine of imputation exists in all cases where the agent is acting within the scope of his authority.

The doctrine does not rest on a presumption that the agent will communicate his information to his principal. This Court, in effect, so held in *St. Louis, etc. v. Johnston*, *supra*.

10. Plant, in accepting, for the First National, the check in question, was acting within the scope of his authority.

Whether we consider the act of payment itself, or the results of the payment, his interests were not adverse to, but were concurrent with, those of the First National.

If the interests had been conflicting, he was authorized by the action of the Board of Directors, acquiesced in by the stockholders, to control this particular kind of his in-

debtedness to the bank, increasing or diminishing it daily as he liked. (Tr., 24, Q. 214 and 215; p. 17, Q. 141 to p. 18, Q. 148.)

11. Even if the doctrine of imputation did rest on the probability of the agent communicating his knowledge to his principal, there was no improbability that Plant would have communicated to the other officers of the bank, had there been any occasion to do so, the fact that he owed the American Bank \$3,000.00 or even \$50,000.00. Either sum was an inconsiderable sum compared with his reputed wealth. (Tr., p. 19, Q. 154 to 161.)

12. The trial judge was in error in directing a verdict for the plaintiff below. If we are correct in our contentions as to the law, there was no evidence whatever to support such a verdict.

13. The trial judge was in error in not instructing a verdict for defendant below.

14. If he was not in error in not directing a verdict for defendant, he should at least have submitted the case to the jury. The dual requests were not tantamount to an agreement that he should find the facts.

Beutell v. McGone, 157 U. S., 157.

Menahan v. Grand Trunk R. R., 70 C. C. A., 463; 138 Fed., 37.

ARGUMENT.

ASSIGNMENTS NOS. 1 AND 2.

The contentions in both of these assignments are based on the fact of mistake and its legal consequence. We will therefore discuss both together.

In these assignments plaintiff in error insists that inasmuch as the book entries made by the American National Bank were made in ignorance of the insolvency, suspension and bankruptcy of Plant, and hence in ignorance of its right of set off, they were made under mistake of fact, and that it had a right to ignore them and insist on the right of set off. That the right existed does not admit of question.

Nashville Trust Co. v. Bank, 91 Tenn., 336.

Georgia Seed Co. v. Talmage & Co., 96 Ga., 254, 259.

Carr. v. Hamilton, 129 U. S., 253.

Laclede Bank v. Craig, Assignee, 120 U. S., 511.

The Tennessee case involved a large amount. It was argued by J. M. Dickinson on one side and by J. C. McReynolds on the other. The opinion was by John A. Pitts as special judge, one of Tennessee's ablest lawyers, and was able and exhaustive. The Court held that the mere fact of insolvency gave rise to the right of set off, though the debt sought to be set off was not a. . . ; that the right existed at law as well as in equity; that the asset which passed in that case from the bank to the assignee under the gen-

eral assignment, consisted only of the balance remaining due after deducting the debt of the bank. When insolvency or bankruptcy comes the law sets off the one debt against the other without any action on the part of the creditor. His debt is only what remains due to him after deducting the smaller debt which he owes to his debtor. Beyond this, the debt due him is paid by operation of law. If sued on the smaller debt he can maintain a plea of set off, notwithstanding he has prior to suit done no act implying an assertion of his right. On the other hand, when he proves his debt in the insolvency proceedings the law treats the debt due him as being only what remains after the set-off debt is deducted, though he may have taken no step to make the set off. The law does that. The question presented therefore is whether the American Bank repudiated this action of the law, and lost the privilege of asserting its rights thus conferred by the law, by the book entries in question made in absolute ignorance of the existence of those facts which put the law of set off in operation—in other words, in absolute ignorance of its legal rights.

The natural equities of this case are overwhelmingly with the American Bank. Its debt against Plant, on which it receives only about 10 or 11 cents on the dollar, amounted, without the set off, to \$50,000, and with the \$3,000 deducted, to \$47,000. It was entitled to this deduction. On this subject the Supreme Court of Tennessee, the State under whose laws the rights of the American Bank arise, in the case cited above say:

“And, first of all, it must be remembered that the doctrine of set off, whether legal or equitable, is essentially a doctrine of equity. It was that natural justice and equity which dictates that the demands of parties mutually indebted should be set off against each other, and only the balance recovered, that gave birth to the idea of accomplishing that result in a judicial proceeding. . . . The jurisdiction of courts of equity over the subject of set off was exercised before there was any statute upon the subject. . . . The natural equity to have mutual but unconnected demands between two parties who have been dealing with each other set off, is as a general rule superior to the claim of any other creditor who has not dealt with the insolvent upon the faith of the specific fund against which the right of set off is claimed.”

This Court, in *Carr v. Hamilton*, 129 U. S., 253, say:

“In pursuance of these old statutes and the dictates of equity, the principle of set off between mutual debts and credits has for nearly two centuries past been adopted in the English Bankruptcy Laws, and has always prevailed in our own whenever we have had such a law in force in our statute books; and it matters not whether the debt was due at the time of bankruptcy or not.”

The court cites various cases, acts of Congress and treatises on bankruptcy.

The First National paid nothing for this check, but took it as a means of payment on a pre-existing debt. The American returned it, and claimed its

right of set off promptly. The First National had ample time to prove its whole debt against Plant's estate, and lost absolutely nothing by the transaction. If plaintiff is unsuccessful in this suit the Macon bank will be just where it was before it took the check. Its creditors are all paid in full. This suit is in behalf of its stockholders. These stockholders include some of Plant's relatives, he owning a large part of the stock himself. He was general manager of the bank, directed its financial policy, controlled its discounts and credits, and especially dictated what paper of his own should be received by the bank for either discount or credit. The trial court found that "he was the general manager of the affairs of the bank." (Tr., 108, 2d par.)

His clearing house balances were an illustration of the manner in which he controlled his own dealings with the bank. They constituted a daily shifting indebtedness to the bank, payments being made daily and new amounts being added to the indebtedness daily. This was not a mere daily overdraft, but an indebtedness bearing eight per cent interest, and evidenced by tickets carried as cash in the cash drawer. Plant thus controlled absolutely the loans which the bank made to himself and the payments made to the bank by himself. He borrowed when he pleased and in such amounts as he pleased and paid when and in such amounts as he pleased.

This course of dealing was objected to by Williams, the cashier, and the latter talked with two of the directors about it (Tr., 18) and finally resigned on

account of it, tendering his resignation to the board of directors. The directors sustained Plant and accepted Williams' resignation. Plant then put Findlay in as cashier, a mere clerk of Plant's, with an understanding that Plant should continue to control things as he had done in the past, and this in fact he did do. This course of dealing was of long continuance, was sanctioned by the directors and acquiesced in by the stockholders, and it is in the exclusive interest of these stockholders that this suit is being prosecuted. This relation between Plant and the bank alone furnishes abundant ground for contending, as we herein do contend, that when Plant paid this \$3,000 to the bank on his debt for the clearing house balances, he was acting within the scope of his authority, and that any knowledge which he possessed bearing on the transaction must be imputed to the corporation, so that anything which the corporation subsequently did or failed to do was done or omitted with full knowledge.

But proceeding with the argument as to the effect of mistake, the principle of law is general that acts done under mistake of fact, and sometimes even under mistake of law, are not binding, and the party who is the victim of the mistake has the right to treat the acts as though they had never taken place. Why the principle should not be applicable to this case is not apparent. The Court of Appeals decided on this point as follows:

“The transaction is thus complete, and cannot be rescinded except for fraud or in case of

mutual mistake. *National Bank v. Burkhart*, 100 U. S., 686, 689; *Montgomery County v. Cochran* (C. C. A., 5), 126 Fed., 456, 460; *Riverside Bank v. National Bank* (C. C. A., 2), 74 Fed., 276, 278, and cases there cited. If, therefore, the Circuit Court correctly held that the Macon National Bank was not bound by Plant's knowledge of his own insolvency and his indebtedness to the defendant bank, nor in default for not advising the defendant bank of Plant's embarrassed condition at the time it became known to the officers of the Macon National Bank, who were then in personal charge of its affairs, it is evident that the plaintiff was entitled to a direction of the verdict in its favor. The doctrine of mutual mistake does not apply." (Tr., 144.)

There would seem to be no escape from the dilemma, that either the First National had no knowledge of the suspension, insolvency and bankruptcy of Plant before the book entries were made and the letter of advice mailed, in which case the mistake was mutual, or it did have knowledge of these events within the time stated, and the transaction was, so far as it was concerned, tainted with bad faith. But we think that mutuality of the mistake is not necessary to entitle the innocent victim of the mistake to relief. The fact that one party to the transaction is not laboring under any mistake, but with knowledge of undisclosed material facts of which the other party is ignorant, we think, only intensifies the right of the other party to relief on the ground of mistake. We therefore think that the right to relief on the ground of mistake is not confined to cases of mutual mistake.

It will be seen that the Court of Appeals first recognizes cases of mutual mistake as ones in which relief can be granted, and then declares that the doctrine of mutual mistake has no application to this case if both parties were ignorant of the facts in question. The Court cites *National Bank v. Burkhart*, 100 U. S., 686, 689; *Montgomery County v. Cochran*, C. C. A., 5 (126 Fed., 456, 460); *Riverside Bank v. National Bank*, C. C. A., 2 (74 Fed., 267, 278), and cases there cited. Neither one of these three cases involved any question of fraud or mistake, mutual or otherwise.

The case of *National Bank v. Burkhart*, 100 U. S., 686, was one in which a party had guaranteed the payment to a bank of any paper, to the extent of \$50,000.00 of a third party, of which it might thereafter become a holder. The person guaranteed drew a check on the bank for a large amount and delivered it to a third party, a customer of the bank. This customer presented the check for deposit to the bank, and the question was whether the deposit was unconditionally accepted at the hour presented or whether it was only accepted subject to examination. If unconditionally accepted it was not within the guarantee. This was the sole question in the case. The jury had in effect found that it was unconditionally accepted. The Court then simply states the general unquestioned proposition that when a check is presented to a bank for deposit and the bank accepts it, crediting the depositor and charging the drawer, the check is paid and the bank becomes debtor to the depositor. The Court adds, on page 689, such a con-

tract so entered into is binding upon both parties, "there being no fraud." We think it is evident that the Court simply meant that such a contract is binding unless there be some equitable ground to set it aside, and happens to mention fraud as such a ground. Certainly the Court was not undertaking to enumerate all the equitable grounds which would avoid the contract, there being no question of the kind in the case.

The case of *Montgomery County v. Cochran* (C. A., 5), 126 Fed., 456, 460, was a case in which a County Treasurer had received a check for a large amount and deposited in an insolvent bank, the law forbidding a deposit in any bank. He and his surety were sued on his bond. The defendants claimed that the treasurer had never collected the money. The Court held, however, that as the treasurer had presented the check to the bank for deposit and it had been entered to his credit and charged to the drawer and the treasurer had charged himself with the amount of it on his books, he had in substance collected and deposited the money and the bond had been breached. There was no question of fraud or mistake in the case.

The case of *Riverside Bank v. National Bank* (C. A., 2), 74 Fed., 267, 278, was one in which the bank had certified a note payable at that bank, believing that the maker's account was sufficient to meet it, a note so payable being in legal effect a check. Finding that the account of the maker was insufficient to pay the note, the bank undertook to rescind the transac-

tion. Of course, the court held that the bank could not do so, stating that the defendant had "agreed to pay the amount, and the contract can no more be rescinded than any other contract." It is well settled law that if a bank, having the means of ascertaining from its own books the state of the account of any one of its customers, sees fit to pay his check without examining the account, it is guilty of negligence and pays at its peril so far as third parties are concerned. The Court states the general rule that a party paying money under mistake may recover it back, but states that there are two exceptions to the rule, and then states the exceptions to be cases where there is a mistake as to the signature of the drawer of the check or a mistake as to the state of his account, and that in this case the action of the bank is conclusive between the holder and the drawee. In that case it further appeared that the depositor had lost his opportunity for recourse on an indorser or maker.

We think that both reason and authority establish the proposition that the victim of the mistake is entitled to relief, whether his adversary was acting under the same mistake or not. That the American National Bank was acting under a mistake is not questioned, nor questionable.

The alleged payment was not only a mere paper payment, but was not complete until the letter of advice was mailed, which was at least as late as four o'clock p.m., May 16. Insolvency existed long prior to May 16, suspension took place as early as nine a.m., May 16 (Tr. p. 24, Q. 222), and the bankruptcy

as early as 11:45 a.m. of that day. (Tr. p. 3, Sec VI). The American National, through the entire day of May 16 and longer, was ignorant of the facts of insolvency, suspension and bankruptcy, and hence ignorant of its rights. It supposed Plant to be solvent and to be going on in business as usual. (Tr. pp. 71-80.) All these facts are not only proven by uncontradicted testimony, but all of them were found by the court. (Tr., pp. 105, 106.)

The cases are numerous where parties paying money, releasing liens or parting with other valuable rights, including the right to set off, under a mistake have been permitted to reclaim the money for the purpose of availing themselves of the set off or to assert the other legal right.

In the case *re Far. & Mech. Bank of Rochester*, 13 Fed. 361, Roberts, a depositor, had to his credit in the bank \$650.00. The bank held a note against him for \$500.00. He went into bankruptcy. The bank, forgetting that it held the note, paid the amount of the deposit to the assignee in bankruptcy. The bank had been advised that it could not set off the note against the deposit, but the Court held that the mistake as to his legal right entitled him to recover the money. The action was, in a court of law for money had and received.

The case *re Dickinson*, 5 Bankrupt Rep., 483, involved the following facts:

Nayor & Dickinson made a general assignment. Subsequently, on the same day, they drew

their check for their bank balance in favor of the assignee. The bank, without knowledge of the assignment, took up the check by its due bill to the assignee. Soon afterwards the assignee informed the bank of the assignment and the bank demanded a return of the due bill and claimed the right of set-off. It was agreed that the assignee should hold the fund subject to the decision of some competent court. The check was for \$9,012.97, and the debt due the bank was \$40,000.00. After this the firm was adjudged bankrupt, and the fund was turned over to the trustee. The bank insisted that its right of set-off had not been impaired by the giving of the due bill, because it had been given in ignorance of the assignment. The Court so held. The Court says that this ignorance deprived the bank of the opportunity to decline recognition of the title of the assignee and to hold the fund for distribution or disposition in a bankrupt court which would take jurisdiction of the fund upon proof that the assignment had been made. The bank had a right to know and to select its own course of action and self-protection. The Court further says if it, the bank, had known "the Court would not seek to undo what it (the bank) had openly done consciously and pursuant to law." Surely the book entries in our case are not more effective than the giving of the due bill in the above cited case.

Another case was *Union National Bank v. McKay*, 102 Fed., 662. This was also a case in which the bank had paid over the deposit to a assignee in bankruptcy, forgetting that it held a debt against the bankrupt. The Court held this forgetfulness to be

in law a mistake, and decreed the repayment of the money.

The Tennessee court, in *Guild v. Baldridge*, 2 Swan, 295, reviewed the case of *Kelly v. Solare*, 9 Meeson and Welsby, 54, where an insurance company had paid a lapsed insurance policy, having forgotten the fact that the policy had been marked lapsed for non-payment of premium. In that case the Court says:

“I think that where money is paid to another, under the influence of a mistake—that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payor that the fact was untrue—an action will lie to recover it back and it is against conscience to retain it.” (P. 299.)

The case of *Bell v. Gardner*, 4 Man. G. 10, is quoted from in the Tennessee case. The mistake was in taking up as endorser a dishonored bill of exchange after the endorser had been, in law, released from his liability on it by a material alteration of it. The endorser was ignorant of the alteration when he took it up. The Court in that case said:

“Where a payment has been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it is found to have been paid unjustly, the party paying may recover it back again.”

In the case of *French v. DeBow*, 38 Michigan, 708,

a mortgagee released the lien of his mortgage on lands in consideration of an absolute conveyance to him of a part of the lands covered by the mortgage. When he accepted this conveyance he supposed the lands to be entirely unencumbered except by his own mortgage. It turned out, however, that the mortgagor had put an encumbrance on the lands subsequent to the mortgage and prior to the conveyance. The result was the mortgagee had released his mortgage lien for a supposed valuable consideration, but really without consideration, the title to the lands conveyed to him being invalid. He brought suit to have his mortgage lien reinstated, and the court reinstated it on the ground that it had been released under mistake of fact. What difference in principle can there be between the release of a mortgage lien under mistake of fact and the failure, due to mistake of fact, to exercise a right of set-off?

Noble v. Doughten, 72 Kan., 336, also involved the question of mistake. A check had been endorsed by the payee to a third party. Through the negligence of this endorsee the check was not presented with the promptness which the law required, and before it was presented the bank failed. The endorser, knowing that payment had been refused, and ignorant of the holder's negligence, took it up with his check on another bank. The Court held that the endorser, having paid or taken up the first check in ignorance of the holder's (the endorsee's) negligence could, on the ground of mistake, recover back the money.

Had the bank paid this money to Mr. Plant, it

could have recovered it back. He knew that he was insolvent. He knew that the bank held a large debt against him. He is conclusively presumed to know that the right of set-off existed. It was a wrong for him to have drawn a check under the circumstances. After he had suspended business as an insolvent, and especially after he had gone into bankruptcy, it was his duty to have notified the bank of his situation.

"When a person has committed a notorious act of insolvency it is fraud not to communicate the fact to those with whom he has previously dealt."
Mitchel vs. Warden, 20 Barbour, 233; Pegulno v. Taylor, 38 Barbour, 375; Chaffer v. Fort, 2 Lansing, 81; Kerr on Fraud and Mistake, 109."

The same principle is involved when a depositor draws a check, knowing that he has no funds with which to meet it and no reasonable prospect of its being met, or ~~getting~~ a check certified when he is insolvent.

In the case of the Standard Oil Co. v. Hawkins, 74 Fed. Rep., 395, a party deposited money in a bank which was insolvent, but its insolvency was not known to him. The bank was put into the hands of a receiver and the depositor proved his debt in the liquidation proceeding. Afterwards, upon taking legal advice, he found that he was entitled to recover the deposit. He declined his dividend and asked leave to withdraw his proof of claim. He filed a bill asking to be permitted to "re-assert" his election of remedies made under mistake of law and to recover from the receiver the full amount of the deposit. The

United States Court of Appeals decreed that he had the right to do so.

In the case of *Peterson v. Union National Bank*, 52 Pa., 206 (91 American Decisions), 146), in which Judge Strong delivered the opinion, the Court say:

"That the check of Stamford & Houston was not actually paid is a conceded fact. No more is claimed than that the bank paid it in legal effect by charging it to the drawer and crediting its amount to the plaintiffs. But what of that? Surely it needs no argument to prove that the plaintiffs can retain no credit by their fraud. The drawing of a check upon a bank in which the drawer has no funds and uttering it is a fraud. It amounts to a false affirmation that the money is there to meet it. Hence it is a deceit practiced upon any person to whom the check may be negotiated and equally upon the bank upon which it may be drawn. It is manifestly impossible for the officers of a bank to keep ever in memory the state of each depositor's account. To a certain extent confidence is reposed in the depositor that he will not present for payment a check which he has not provided funds to meet and the abuse of that confidence is dishonest. It is not easy to see how it is less dishonest in the holder of the check drawn by another party, to present it for payment, when he knows the drawer has no funds in bank to meet it. His knowledge makes him a party to the fraud of the drawer, and he becomes a willing assistant therein." (P. 206.)

A case similar in principle is that of *Starbuck v. Mansfield*, in 20 N. Y., 227. The party had paid for

work done, mistaking the quantity of it, and receiver of the money knowing it was an overpayment. The Court said that if the payee "did not perpetrate a fraud, at least he committed a wrong." (P. 230.)

The Court of Appeals conceded for the purposes of the suit that as against Plant and any one standing in his shoes, the American Bank was entitled to relief. (Tr., 143.)

This doctrine applies to cases where the money has been paid to third parties as well as to cases where it is paid to the drawer or maker of the paper. The only difference is this: If the third party is an innocent holder for value or has been put in any worse condition because of the payment than he was in before the payment was made, he can retain the money.

In the case of *Guild v. Baldrige*, 2 Swan (Tenn.), 295, a party who had been indebted to another, but had paid the debt, paid it a second time to a creditor of his supposed creditor under a judgment and garnishment process. When he made the second payment he expressed his belief that he had previously paid the debt, but could find no receipt. Some time after the second payment he found a receipt in full for the debt, and sued the creditor of his supposed creditor to recover back the money paid the second time. The Court held that the payment having been made under a mistake of facts, he was entitled to recover. The reasoning of the case is so satisfactory that we invite the Court to the reading of the whole opinion. It will be noticed that the payment was

made in cash, not as in our case, by mere book entries. The plaintiff had previously known of the fact of which he was ignorant when he made the payment. But the American National Bank had never known of Plant's insolvency or bankruptcy, and had never had the means of knowing it. In that case the party to whom payment was made was entirely innocent, and, as in this case, the payment had been made on a pre-existing debt.

This case is the same in principle as that one. In the latter the party, under mistake, parted with his money; in this the American National Bank parted, as is alleged, with its right of set-off, which is substantially the same thing as money—it pays debts.

In *Guild v. Baldrige*, the Court draws the distinction between cases where payment has been made to an innocent third party who has parted with value and those in which he has not. The Court say:

“Take the case of a payment, without knowledge of the facts, made, not to the original creditor of the party paying, whose debt had been previously satisfied, but to a creditor of his who received the money in good faith, ignorant of the mistake, and in satisfaction of a just demand, and who, in consequence of such payment, may have waived or lost his remedy against his debtor. In such case it is clear, upon well-established principles, that the plaintiff would not be entitled to recover. The defendant, in the given case, would be equally innocent, as the plaintiff, of the mistake; and having lost his remedy upon the faith of such payment, it would not be

against conscience for him to retain the money, and the loss must fall upon the plaintiff, by whose act, though innocently done, it was occasioned. But when no such injury would necessarily result, it is wholly immaterial, as respects the plaintiff's right of recovery, whether the payment by mistake was to the person whose debt had been previously discharged, or to a third person claiming to be a creditor of his. The plaintiff's right is precisely the same as against either, in the absence of some such peculiar equity as is supposed to exist in the foregoing case."

The First National Bank parted with nothing of value on the strength of the check. The receiver was promptly notified that the check had been charged back and would not be paid and that the set-off would be claimed. He had ample time and opportunity to have proved his debt against Plant's estate, and it must be presumed that he did so. Under the laws of Georgia, a check is presumed not to be taken in extinguishment of a debt. (Tr., 63.) *Weaver v. Nixon and Webster*, 69 Ga., 699-702. Code of Ga., Sec. 3720. Tr., 6

The same doctrine as to payments to innocent third parties is announced in *Bank of Republic v. Baxter*, 31 Vermont, 101. A depositor drew, and procured the bank, on the representation of his solvency, to certify a check for \$7,350.00, and delivered it to another bank for the use of his creditor in payment of his debt. The drawer proved to be hopelessly insolvent. The bank was ignorant of this fact when the check was certified. The Court say:

“It is not claimed that he (the creditor) ever performed any act, or failed to perform any, or ever parted with any consideration, or yielded any right or advantage on the credit of this fund.

* * * Upon this comparison of the respective rights of these two claimants of this fund, we think there can be but one opinion, that is, that the orator’s right, not only in natural and substantial justice, but in law and equity, is quite superior to that of H. H. Baxter (the creditor).”

The Cyclopedea of Law and Procedure (C. Y. C.), Vol 5, page 542b, undertaking to state the established law on this subject, says:

“When payment is made to the holder of paper, who has come into possession of it without any fault on his part, and his situation would be rendered worse if compelled to refund than it was before he received payment, the money cannot be recovered from him. If, however, he has been negligent in any regard, he cannot retain the money. To justify him in doing so, the bank alone must be negligent. If neither party has been negligent, or both have been, then the bank can recover the money.”

It will be seen that even if the party receiving the money has been put in worse condition, yet if he has been negligent, he may be compelled to return it on the ground of mistake, even though the other party has been negligent also. The equity in favor of the payor is greater than that of the payee, where the payee alone is negligent or even where both are negligent.

The digester cites a large number of English and American cases in support of the text.

ASSIGNMENTS OF ERROR NOS. 3, 3A, 3B, 3C AND 3D.

All five of these assignments of error involve or lead up to the general question as to whether Plant's knowledge was imputable to the First National Bank. They will therefore be argued together, proper reference being made, in the course of the argument, to each of the sub-assignments.

It was, of course, wrong for Mr. Plant to have drawn and delivered this check. He knew he was insolvent. It can hardly be doubted that he realized himself to be in a desperate condition at the time the check was drawn and delivered. It was drawn on Saturday. On that day his bank closed forever. By 11:45 on Monday he was in a court of bankruptcy. Preparations for bankruptcy must have been made on Sunday. He knew that he owed the American Bank a debt of \$50,000.00. He is conclusively presumed to know that the bank had a right under the existing circumstances to off set his deposit balance against this indebtedness. As heretofore stated, it is the law that "when a person has committed a notorious act of insolvency it is a fraud not to communicate the fact to those with whom he had previously dealt. *Mitchell v. Warden*, 20 Barbour 253; *Pegulno v. Taylor*, 38 Barb., 375; *Chaffer v. Fort*, 2 Lansing, 81; *Kerr on Fraud & Mistake*, 109.

He not only did not notify the bank of his condition, but attempted to deprive the bank of its valuable

right of set off to the extent of the \$3,000.00. He attempted a serious wrong. It was a wrong of the same character as to draw, and attempt to have collected, a check when the drawer has no funds with which to meet it and no reasonable prospect of having any; or to get a check certified as good when the drawer is insolvent.

If the First National knew of his insolvency, either when it received the check or at any time before the contract of deposit was consummated, that bank was *particeps criminis*. Suppose the First National had, through one of its agents, made its deposit in person, and after it had handed in the check and before the check had been accepted by the teller and entered upon its deposit book, it had acquired guilty knowledge, of course it would have been morally and legally bound to have communicated the information and would have been guilty of fraudulently suppressing facts had it allowed the contract and act of deposit to be consummated without disclosure. This deposit was not made in person but by mail. As said by this Court in 100 U. S., 689, such a transaction consists of an offer to deposit and an acceptance of the offer. No contract made by correspondence is a contract until the offer of one party is accepted by the other by a deposit of the letter of acceptance in the mail. *Bank v. Yardly*, 165 N., 646. This rule applies to contracts of bank deposit. *Bk. of Rep. v. Baxter*, 31 Vermont, 101. The offer in this case was made by the letter of the First National. It was not accepted until the American deposited its letter of advice in the United States mail. This is the universal law in

regard to contracts entered into through correspondence except that some of the states hold that the contract is not consummated until the letter is actually received by the party making the offer.

Before this acceptance and even before any of the book entries were made by the American Bank, every officer of the First National knew that Plant had, in the language of the decisions, "committed a notorious act of insolvency." There is no necessity for resorting to Plant's imputed knowledge as to this.

At 11:45 a.m. he was in the bankrupt court, and the finding of the court and the proof show that the bank officers learned of this bankruptcy about the time it occurred. Of course, they all knew it before the letter of advice was mailed, so that as to everything except Plant's indebtedness to the American Bank, the First National is charged with full information, while the deposit contract and the making of the deposit were still *in fieri* independent of any imputed knowledge. The proof shows that the check was not credited to the First National until as late as 10:30 and probably 11:00 o'clock. (Tr., 75.) It was not charged to Plant until after 3:30 p.m. (Tr., 75.) The letter of advice was not mailed until after 4:00 p.m. (Tr., 75.) The witnesses who prove these facts were by both parties, and hence there was no conflict.

We insist that it was immaterial whether or not the First National knew of Plant's indebtedness to the American Bank. He had committed a notorious act of insolvency, and it was his duty to have com-

municated the fact to those with whom he had previously dealt. The First National being informed of this notorious act of insolvency as early as nine o'clock in the morning and being engaged in the process of making a deposit of the check, was charged with the same duty that Plant was charged with, of communicating to the American Bank the fact of this notorious insolvency. The same is true as to the bankruptcy, as soon as the First National acquired information of it. Judge Strong, in the case of *Peterson v. Union National Bank*, 52 Penn., said, when speaking of the deposit of a check of an insolvent with knowledge, says, "it is not easy to see how it is less dishonest in the holder of a check . . . when he knows the drawer has no funds to meet it." So we think its knowledge of Plant's indebtedness was immaterial so far as the result in this case is concerned. The American Bank had, in the language of *re Dickinson*, 5 B. R., 593, a right to full information that it might elect what course it should take for self-protection.

We insist that Plant's relation to the First National was such that his knowledge was imputable. The Court found that Plant "was a large stockholder and president of the First National Bank and controlled its policy and management, and that it was a general custom in the bank to accept and discount any paper that he might send to them and to credit upon his account any paper that he might send for the purposes of credits." (Tr., 104.) The Court also found that he was "General Manager of the affairs of the bank." (Tr., 108.) The full scope of the

Court's language is made more clear by the undisputed proof to which we now call the Court's attention.

Findlay, the so-called cashier, makes the following statement of his agreement when he took his position:

"Q. 213. Did you control the discounts *and papers taken in* the First National Bank as cashier, or was that under the direction of Mr. Plant?

A. Mr. Plant had charge of that—when I went over there he told me that he wanted me to do practically nothing for a while until I could familiarize myself with things and the customs of the bank, and then, as he expressed it, he said, you and I together will look after the discounts, they were left to him, really I didn't know the custom of the bank, with the exception of a few small minor loans, I didn't pass on any of those things except under his direction." (Tr., 23; Q. 213.)

Mr. Findley testifies that up to the time of the bank's failure he had not learned the customers of the bank. (Tr., p. 24; Q. 213.) (We think the word "customs" in his testimony is a misprint for "customers.")

Again, in his deposition taken by Defendant in Error, he testifies as follows:

"Q. During the period of his illness the papers were in fact brought in by Charlie Hurt, were not they?

A. Yes, sir; and before his illness the papers that were discounted there were usually brought in by Mr. Hurt—sometimes I think Mr. Plant would bring them in himself, but in regard to instructions, I would like to state this, that when I went over there, there were just general instructions, or perhaps you might say understanding there, that any papers that Hurt would bring in for *credit* or discount would be accepted." (Tr., 89.)

Thus he shows that he means by the words "discounts and papers taken in" (Tr., 23; Q. 213) in his first deposition, the same thing as by papers "brought in for credit or discount" in his second deposition. (P. 89, last Q.) That he meant to include paper sent for payment on Plant's indebtedness is made clear on page 24, Ques. 214, as follows:

"Q. 214. The indebtedness of Mr. Plant to the First National Bank, was it controlled by him or by you?

A. It was controlled by him."

Mr. Stallings, the bookkeeper, testified as follows:

"Q. 17. Mr. Stallings, in the conduct of the business of the First National Bank, was the business run by a finance or executive committee, or was it operated by Mr. Plant himself for the most part? In other words, *who was the managing head and director of that bank?*

A. Mr. R. H. Plant.

Q. 18. Did any committee of the directors look after the discounts *and pass upon the paper*

taken in day by day, or was that done under the direction of Mr. Plant?

A. Why, it was under the direction of Mr. Plant." (Tr., Q. 17 and 18.)

As to the handling of Mr. Plant's own paper by the bank, Mr. Stallings, the bookkeeper (Tr., p. 6; Q. Nos. 23 and 24) testified as follows:

"Q. 23. You were familiar with the general workings of that bank from day to day, were you; you were there and saw what went on?

A. Yes, sir.

Q. 24. Such paper of Mr. Plant's own that he turned over to the bank *for credit or discount* was accepted?

A. Yes, sir."

Mr. Findley says that, under the arrangement,

"Anything Mr. Hurt would bring in for I. C. Plant's Sons was accepted."

"Q. So that anything *Mr. Plant* sent in there was accepted by you for the First National Bank *without any question?*

A. Yes, sir." (Tr., p. 89; first ques.)

As a matter of fact, Plant was the only person who had anything to do with the acceptance of this check for the First National. Findley, the cashier, testifies:

"Q. 227. You don't know whether Mr. Plant got the cash on that check or not?

A. No, I do not.

Q. 227. You don't know how he used the check?

A. I just know such a check was taken in that day, but I don't know whether it was placed to his credit or whether it was cashed for him, or whether it was credited on Plant's Son's clearing house balance. I merely know that such a check was handled there.

Q. 228. The First National Bank of Macon sent that check to the American National Bank of Nashville, they sent that in on the 13th to the Nashville bank?

A. Yes, sir; I presume so; *I didn't handle that personally.*" (Tr., 35; Q. 226 to 228.)

Again Findley says:

"Q. Who handled the particular transaction of sending this draft on to Nashville?

A. That I *don't know*. I think that the draft in question was brought in *by Mr. Hurt*, together with a number of other papers, and turned over *either to the teller or to the bookkeeper to be credited on the clearing house balance*, I think, of *I. C. Plant's Son.*" (Tr., 85, Q. 5.)

Stallings, the bookkeeper, says:

"Q. Do you recollect who handled the \$3,000 transaction with the American National Bank of Nashville?

A. The entries were made *by myself*.

Q. Do you know who forwarded the draft?

A. You mean who actually inclosed it?

Q. Well, gave directions about it, for instance?

A. The direction of the draft was made when *I charged it up*, when I made the entries for it, *that settled* the course the draft was to take." (Tr., 96, Q. 2.)

Geo. H. Plant, brother of R. H. Plant, who was assisting Mr. Findley while R. H. was sick, was questioned as to who handled the particular transaction, and does not profess to have had anything to do with it. (Tr., 92.)

The stipulation says Plant drew the check and sent it to the bank, and sent it for the purpose of a payment to his clearing-house debt to the bank. Under his relation to the bank and his recognized powers the mere sending to the bank for that purpose was *ipso facto* an acceptance of it for the bank, and the act was so treated by the employees of the bank.

Thus it is made clear that Plant had long controlled his own indebtedness to the bank, that Williams raised an issue with him as to his right to control his indebtedness for the clearing house balances and talked with two of the directors about it, and then tendered his resignation to the board of directors and they sustained Plant and accepted Williams' resignation (Tr., 18); that Plant employed Findley with the distinct understanding that he (Plant) alone should control all discounts and credits, and, what is most pertinent in this case, his own indebtedness to the bank; and that Plant did actually so control these things, and this whole course of business was sanc-

tioned by the directors and not objected to but acquiesced in by the stockholders, the only persons pecuniarily interested in this suit.

It being true that R. H. Plant acted for the First National in the reception of this check, his knowledge was imputable. But the Court of Appeals was of opinion that the case presents an exception to this rule.

After stating the general rule, the opinion enumerates as an exception a case where the agent is engaged in attempt to defraud the principal in the transaction in question. No one contends that that is applicable to this case. Plant was attempting to pay the bank \$3,000, and for the double reason that he thereby paid his own debt and the further reason that it was important that it should be paid at this particular time to prepare the bank for examination. There was no element of fraud whatever in his motives or in his act. Another exception stated by the Court is instances in which the agent has an interest adverse to his principal in the particular transaction in question. This we think can hardly be called an exception to the rule. In short, we think that the law on this subject is, that whenever the agent is acting within the scope of his authority, his knowledge of facts bearing upon the transaction are imputed to the principal. When his interests are adverse to the principal, he is not acting within the scope of his authority, because he has no authority in such a case, unless it be expressly given by the principal, to act for both the principal and himself. In such a case, therefore, the

agent is acting outside of the scope of his authority, and hence knowledge cannot be imputed. Although it has been sometimes stated that the reason why the law will not impute the agent's knowledge where the interests are adverse is because it is not presumable that the agent would communicate his knowledge to his principal, we do not believe that this is the true basis of the doctrine. When the agent is authorized to do the act in question, there is no occasion whatever for him to communicate with, or impart information to, his principal. Were proof offered to show that he did or did not so communicate, it would be irrelevant. And any presumption relied on, in lieu of proof, is equally irrelevant. Adversity of interest cuts no figure, except as it bears upon the question of the authority of the agent. The Court in the opinion states the general rule that, "The Principal is held to know all that his agent knows in any transaction in which the agent acts for him." (Tr., 145.) He then quotes from Judge Taft in *Thompson-Houston Elec. Co. v. Capital Elec. Co.*, as follows:

"This rule is said to be based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty." (Tr., 145.)

¶We think the words, "This rule *is said* to be based" indicate that Judge Taft himself was unwilling to sanction this basis of the principle of law. What he says is quoted by him from some one else.

We think, with all deference to the opinion of the learned Court, that it was fatally an error in assuming that,

“The interest of one dealing with the principal on his own business is adverse to the interest of the principal, and the presumption in such case is that he will not disclose anything detrimental to his own interest.” (Tr., 145.)

We do not think it is correct to say that the agent's interest is adverse in all cases where he acts for both. The interests were not adverse in this case, and in many other cases. The Court in effect holds that in this case the interest of Plant and the bank, in making this payment, were not adverse but concurrent. The Courts say:

“It appears that on May 13th a national bank examiner was in the city of Macon examining another bank, and that on the 14th the examination of the First National Bank of Macon was begun. It is argued from this fact that Plant was acting solely in the interest of the bank in adjusting the clearing house balance referred to. There is no direct evidence that Plant in adjusting this balance was acting in the interest of the bank. On the other hand, it is manifest that he was at least equally interested in protecting himself, and was at least equally acting in his own interest in the transaction in question. He was interested not only as president and a large stockholder in the Macon National Bank, but also as the sole owner of the private bank and as a heavy borrower from the Macon National Bank, being upon paper held by that bank to the amount of over \$500,000, nearly all

by way of endorsement for various corporations with which he was actively connected and which he financed. All the interests mentioned would naturally be seriously injured by the failure of the Macon National Bank, and were thus all interested in Plant's ability to adjust the large clearing house balance due from Plant's private bank. Over \$2,000,000 of claims were proven against Plant's estate, largely on account of his endorsement upon paper of corporations which he represented. These conditions make it practically certain that Plant would not have disclosed to the First National Bank of Macon his own insolvency or the fact that his deposit account in the defendant bank was subject to be set off against a large indebtedness on his part to that bank. There is in this case no room for the application of the rule that the principal receiving the benefit cannot at the same time repudiate the agency, because of the adversary relation here existing and the fact that Plant was not even apparently acting solely in the interest of the bank." (Tr., 145-6.)

From this statement of the facts the Court makes it clear that it was to the concurrent interest of Plant and the bank that this payment should be made, and there was nothing contrary to good morals or law in Plant's acting for both. He was, therefore, acting within the scope of his authority.

But if it had been true that their interests were adverse, it is abundantly shown by the uncontradicted testimony of witnesses, who were the witnesses of both the plaintiff and the defendant, that Plant had for a long period of time been controlling the very

indebtedness on which this payment was made; that is to say, that he had been making daily payments on the indebtedness and making daily additions to it; that his right to do this had been challenged by Williams, cashier of the First National, and the issue brought to the attention of two members of the Board of Directors, and finally brought before the Board by the tender of Williams' resignation because of Plant's control of this indebtedness; and that the Board sustained Plant in his contention for the right to control this indebtedness; and that he continued to do so down to the very day when this check was delivered, and did it in the very delivering of the check; and that his right to thus control his indebtedness to the bank, and particularly this indebtedness, was sanctioned by the directors, and was never questioned by any stockholder, but was acquiesced in. If, therefore, there had been any adversity of interest between him and the bank, he was nevertheless authorized by the directors and stockholders to make this payment, and being authorized, whatever knowledge he had at the time it was made is held to be the knowledge of the principal, regardless of the question as to whether he did in fact communicate this knowledge to his principal, or would have done so, any presumption as to whether he did or did not being immaterial.

The Court say:

“Nor is the agent's knowledge that of the principal when the interest or conduct of the agent is such as to make it certain he would not

disclose his knowledge to his principal.” (Tr., 145.)

In support of this the Court cited *Overton v. Thompson* (C. C. A., 8), 118 Fed., 798, 800, 801. In that case the president of a bank and another owned a lot of cattle. The president of the bank sold them, received the proceeds, and deposited them in the bank in his own name, and checked them out, and used them for his own benefit. The other joint owner sued to hold the bank liable for its president's breach of trust in converting the funds to his own use by depositing them in his own name, and subsequently checking them out and using them for his own purposes. It was not contended that the bank had notice of the trust character of the deposit except by the imputation of the knowledge of the president. Of course the Court held that the knowledge could not be imputed. The president was engaged in the perpetration of a wrong upon his partner, and the bank also.

The Court, in support of the assumption that the interest of the agent and principal are necessarily adverse if the agent is acting for both, cited *Levy v. Kauffman* (C. C. A., 5), 114 Fed., 170-176-177. In this case the firm of Weil & Co. were in a failing condition. The president of a corporation was an uncle of one member of the firm, and Kauffman was a kinsman of another member. They agreed that each would furnish \$15,000.00 to relieve the firm's embarrassment. In fulfillment of this *individual* obligation of the president, he caused the corporation to discount acceptances of the firm to the amount

of \$15,000. It will be seen that this was, in effect, a case of the president obtaining a loan from the corporation. Of course his interests were adverse, and in acting for the corporation he acted without authority.

In support of the proposition that if the transaction is partly for the benefit of the agent, although the latter is representing, but not exclusively, the principal, there is no presumption that his information derogatory to his own right to transact such business will be communicated to his principal. The Courts cite the above mentioned case of *Levy v. Kauffman*, and also *Louisville Trust Co. v. Railroad Co.* (C. C. A. 6, 75 Fed., 433 and 469.) This was a case where the Court held, as stated in the syllabus, that

“A bank whose president has knowledge of a defect in a guaranty on negotiable bonds at the time that it, acting through him, makes a loan thereon, is not charged with notice, he being part owner in the bonds, and the loan being in part for his benefit.”

We think that all of these authorities sustain our contention, that adversity of interest in the particular transaction which renders the act outside of the scope of the agent's authority, is the true ground on which the general rule of imputation does not apply, and that the rule does not rest to any extent on any presumption that the agent will not communicate his information to his principal. The decisions cited by the Court of Appeals do not, in our opinion, sustain

this doctrine of presumption, and the contention is in conflict with the case of *St. Louis, etc., R. R. Co. v. Johnston*, 133 U. S., 566; 33 L. Ed., 683. In that case a deposit of a large check was made in a bank hopelessly insolvent. The Court held that if the corporation knew of its insolvency it was a fraud on the depositor to have received the deposit without disclosing its insolvency. What made the bank insolvent was that the firm of which the President of the bank was a member had largely overdrawn its account in the bank and was insolvent. The firm being insolvent, made the bank insolvent. The Court held, citing other United States cases, that the knowledge of the President of the insolvency of his own firm was knowledge of the bank of its own insolvency, and that the fraud had been committed and that the deposited check, or its proceeds, could be recovered by the depositor.

In that case this court did not regard the improbability of the President of the bank communicating to the bank the insolvency of his firm, as cutting any figure in the case. The adversity of interest must be in the particular transaction in which the agent is engaged. In the case at bar it was impossible for the corporation to lose anything in the transaction by any failure of Plant to impart knowledge of his own indebtedness to the American Bank. The only result which could possibly follow would be to deprive the corporation of the privilege of gaining an unconscionable advantage over the American National Bank. It was a case where ignorance was bliss. The bank could not be hurt by withholding the

information. Had the corporation spoken, it might have said to Plant, withhold from me the facts, lest I be unable to perpetrate this wrong.

But the truth is, the idea of an agent of a corporation informing his principal of anything is mere fiction. Plant, being the absolute general manager of the bank was, for all practical purposes, principal. There was no higher authority for him to consult, or to whom he could impart information.

Plant by this transaction obtained nothing from the bank. It could not possibly be adverse to the interest of the bank that he paid \$3,000.00. He was not obtaining a loan, but paying one. He was not trying to defraud the bank. The results of the payment as to the effect on the examination of the First National were such that both Plant and the bank were concurrently interested in the payment being made, and therefore it is utterly impossible to find in this transaction any conflict of interest, and in order to disqualify the agent, and cut off the doctrine of imputation, there must be conflict of interest in the particular transaction.

But there is no ground for presuming that Plant would not communicate, or would hesitate to communicate, to any other officer of the bank the fact that he was indebted to the American National Bank to the extent of \$3,000,000, or even \$50,000. His financial standing would not have been affected by such knowledge. Up to that time the other officers supposed him to be a very wealthy man—worth millions. A \$3,000.00 debt was a very small thing for

him. And we have no need to invoke the doctrine of imputed knowledge except to that extent. The other officers actually knew of the notorious insolvency and bankruptcy. The imputed knowledge existed Saturday, when the check was received, and remained with the corporation Monday, when the knowledge of the other facts was acquired.

The Court misconstrued Findlay's testimony set out in Assignment of Error 3c. The Court construed Findlay as stating that he was in the habit of crediting any paper received "for credit" from any one. Now, it is immaterial what Findlay was in the habit of doing with other customers than Plant, and it is immaterial what he would have done had he been called upon to act upon this payment of Plant. He was not called upon to act upon it, and did not act, nor did he act on any paper turned in for any purpose by Plant, but we think that, taking the witness's whole statement together, he simply meant that if Plant had sent the papers turned in on May 14 to him, he would not have declined them *because Plant had sent them*. (Tr., 24; Qs. 219-221.)

We have already discussed the questions arising under Assignment 3 and Sub-Assignments 3a, 3c and 3d, and will add nothing further in regard to them.

As to Sub-Assignment 3b, the facts are that Hurt was a director, Vice-President and member of the Executive Committee of the First National Bank. The \$3,000.00 check passed through his hands. We do not contend that he took any action on it, for the undisputed proof clearly shows he did not. Every-

body connected with the bank acted on the assumption, and correctly, that the sending in of the papers by Plant was ipso facto a decision by him on behalf of the bank, that the bank should receive them, and was conclusive. Nevertheless, the paper did pass through Hurt's hands. It was held by the Court of Appeals that there was no evidence that he knew of Plant's indebtedness to the American Bank. The evidence of his knowledge is that that indebtedness consisted of drafts drawn by Plant on the I. C. Plant Sons' Bank, and accepted by that bank. The proof shows that the banking business was kept entirely separate and distinct from Plant's other business, and was managed by Hurt, who had been the Cashier for twelve or thirteen years. It is not presumable that the Cashier of the bank did not know of this large indebtedness, or that the books of the bank failed to show it.

ASSIGNMENT NO. 4.

In this assignment plaintiff in error insists that the Court of Appeals was in error in holding that the request by plaintiff and defendant, respectively, had the effect of taking from the jury, and imposing upon the trial judge the duty of finding the facts. We understand that the right of a trial judge to instruct a verdict arises from the fact that in the opinion of the judge the testimony is so overwhelmingly in favor of the party moving for the instructed verdict that if the jury were to render a verdict in favor of the other party the Court, on motion for a new

trial, would set the verdict aside. When a plaintiff moves for an instructed verdict in his favor, his motion undoubtedly means that the evidence is so overwhelmingly in his favor that the Court would not allow a verdict against him to stand. It is his undoubted legal right, if the Court overrules the motion, to have his case submitted to a jury. He does not waive this right by making his motion, and cannot be presumed to have intended to waive it. There is nothing in the making of the motion that can possibly be construed as intending to waive it. There is nothing in the results of the motion, even if overruled, that can possibly have the legal effect of waiving it. The question, therefore, is whether the motive of the mover, or the legal effects of the motion, can either of them be changed by a similar motion made by the defendant. The import of the defendant's motion, like that of the plaintiff's, is that he insists that the evidence is so overwhelmingly in his favor that the Court would not allow a judgment against him to stand. It is equally clear that he expects, that if his motion is overruled, the case shall go to the jury. By his motion he has done nothing that implies, or can have the legal result, of waiving his right to a jury trial. The results of a motion made by one party cannot be modified by the making of a motion by the other party, much less can the intention of one party be modified by the making of the counter motion. Each motion, with its implied intention and its legal results, must stand upon its own basis, unaffected by anything done by the adverse party.

In the case of *Beutell v. Magone*, 157 U. S., 157; 39 L. Ed., 654, the Court decided as follows:

"The request made to the court by each party to instruct the jury to render a verdict in his favor was not equivalent to the submission of the case to the court, without the intervening of a jury, within the intendment of Sections 649, 700 Revised Statutes."

But plaintiff's counsel insisted before the trial judge that "The two motions were tantamount to taking the case away from the jury, or as a demurrer to the evidence." Plaintiff, therefore, "moved the Court to take the case and consider it on the testimony." In other words, the plaintiff insisted that the result of the two motions was exactly what this Court in *Beutell v. Magone* held it not to be.

It cannot be correctly said that the two parties, by the making of their respective motions, agreed upon anything; on the contrary, they stand at the very antipodes of a disagreement. The one is insisting that the evidence is so overwhelmingly in his favor that he is entitled to an instructed verdict, and the other is insisting that the evidence is so overwhelmingly in his favor that he is entitled to an instructed verdict. These are absolutely all of the implications which can be drawn from their respective motions. And yet the trial court seems to have been of the opinion that the effect of the two motions was exactly what this Court has decided that it was not, that is to say, that this effect was that the Court was called on to find the facts on the weight of the testimony.

The Court did proceed to do so. (Tr., 104 and 105.) We insist that the case of *Beutell v. Magone* was misconstrued by the trial judge, and has been frequently misconstrued by the Circuit and District Courts, and, as stated in the case of *Menahan v. Grand Trunk West Ry. Co.*, 70 C. C. A., 463, 138 Fed., 37, decided by the Sixth Circuit C. C. A., Judges Lorton, Ser-cen and Richards sitting.

“And in all the cases in which the case of *Beutell v. Magone* has been cited in the appellate courts, the conditions were the same; there was *no disputed* question of fact, and there were no special requests. *Merwin v. Magone*, 70 Fed., 776, 17 C. C. A., 361; *Magone v. Origet*, 70 Fed., 778, 17 C. C. A., 363; *Bradley Timber Co. v. White*, 121 Fed., 779, 58 C. C. A., 55; *United States v. Bishop*, 125 Fed., 181, 60 C. C. A., 123; *Phoenix Ins. Co. v. Kerr*, 129 Fed., 723, 64 C. C. A., 251, 66 L. R. A., 569.”

The same question now under consideration has recently been passed on by the Supreme Court of Tennessee in two cases. One case was *Virginia, etc., Co., v. Hodges*, *Southwestern Reporter*, Vol. 149, No. 12 (October 30, 1912), page 1056. The other case is that of *King v. Cox*, *Southwestern Reporter*, Vol. 151, page 58 (No. 1, December 25, 1912). In these opinions that Court, Judge Neil delivering the opinion, went into the whole subject and after very careful consideration held that the effect of these dual motions was not to take the case from the jury. The only power which the Court has is to sustain or to overrule one or the other of the motions and, unless he sustains one or the other, to submit the case to

the jury. The discussion in these cases is so convincing that we invoke for it a careful reading. We respectfully insist that the Court of Appeals was in error in not sustaining this assignment.

In view of the foregoing, it is insisted in behalf of the plaintiff in error, under assignments 5, 6 and 7, that the trial Court was in error in not directing a verdict in favor of plaintiff in error (defendant below), and was in error in directing a verdict in favor of the defendant in error (the plaintiff below), and in taxing the defendant below with the cost, and that the Court of Appeals was in error in not correcting these errors of the trial Court, and in affirming its judgment.

If, however, the Court should be of opinion that the testimony is not free from conflict, nor overwhelmingly enough to warrant an instructed verdict for plaintiff in error, then we insist that it at least did not warrant an instructed verdict for defendant in error, and that the case should be reversed and remanded for trial before a jury.

JOHN M. GAUT,

J. S. PILCHER,

Attorneys for Plaintiff in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

No. 325

**AMERICAN NATIONAL BANK OF
NASHVILLE, TENN.,**

Plaintiff in Error.

VS.

A. L. MILLER, Agent, Etc.,

Defendant in Error.

**In Error to the United States Circuit Court of Appeals
for the Sixth Circuit.**

Brief and Argument for Defendant in Error.

GLOBE D. BACCHER,

Attorney for Defendant in Error.



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Supreme Court of the United States

OCTOBER TERM, 1912

No. 325

AMERICAN NATIONAL BANK OF
NASHVILLE, TENN.,

Plaintiff in Error.

VS.

A. L. MILLER, Agent, Etc.,

Defendant in Error.

In Error to the United States Circuit Court of
Appeals for the Sixth Circuit.

Brief and Argument for Defendant in Error.

I.

BRIEF STATEMENT OF THE CASE.

The defendant in error, a citizen and resident of the State of Georgia, sued the plaintiff in error, a citizen and resident of the State of Tennessee, in a common law action for money had and received to recover a deposit of three thousand (\$3,000.00) dollars made in the defendant bank by the First National Bank of Macon, Ga., of which bank the plaintiff has been duly elected agent. There was a trial by jury, which resulted in a verdict and judgment in favor of the plaintiff, whereupon the

defendant perfected a writ of error to the Circuit Court of Appeals for the Sixth Circuit, which Court duly affirmed the judgment of the lower court, and thereupon this writ of error was brought seeking to review that judgment.

(Record, pp. 107, 125, 126, 137, 147.)

This action was instituted to recover the amount of a check which had been sent to the plaintiff in error by the First National Bank of Macon, Ga., to be deposited to its credit, and which was actually accepted as a deposit and the amount thereof duly credited to the account of the said First National Bank and charged against the drawer of said check.

Stipulation of Facts, Record, pp. 2 and 3.

To this action, several lengthy pleas were interposed, in neither of which is the truth of the foregoing statement questioned, but in each it is practically confessed but sought to be avoided by certain averments of fact and law, which seek to establish the legal rights of the plaintiff in error to absolutely repudiate its acts of receiving said check and of so crediting and charging the amount thereof upon its books and to allow it to retain said amount for its own use and benefit.

Record, pp. 118 to 124.

During the trial, and at the conclusion of the introduction of defendant's testimony, and before any

testimony in rebuttal was offered, counsel for plaintiff below asked the Court for peremptory instructions on behalf of the plaintiff; whereupon, the Court stated that it would hear the motion, but would not act upon it then, and that plaintiff might introduce his rebuttal testimony and it would act on the motion as of the time it was made.

Record, p. 83.

And again at the conclusion of the introduction of all the testimony presented to the Court, counsel renewed their motion for peremptory instructions on behalf of the plaintiff, and thereupon defendant's counsel made a similar motion on behalf of the defendant.

Record, as corrected and supplied, pp. 103, 139.

After due consideration of both oral and written arguments of counsel upon their respective motions and in pursuance to the duty imposed upon him by law, the Honorable District Judge found the facts.

(Record, pp. 104, 106.)

II.

RELATIVE TO OPPOSING COUNSEL'S STATEMENT OF THE CASE.

Opposing counsel's statement of the case does not set forth all of the material facts found by the lower Court, and for that and other reasons, all of the facts found by the Court are fully and accurately set forth in the appendix to this Brief.

Counsel erroneously and unwarrantedly state that on May 17, 1904, or on the day after the check in question was received and the amount thereof credited to the First National Bank and charged to the drawer of the check by the plaintiff in error, those entries on its books were reversed and the amount of said check applied as a setoff on Plant's indebtedness to it. There is absolutely no justification for such a statement to be found in the testimony or in the Court's finding of facts. The Court's finding on this point is in these words: "that, thereafter, on learning these facts, within a few days the American National Bank charged back its entries on the books, etc." (Record, page 106.) The only direct or positive testimony on this point is that said entries were not changed until May 25, 1904, or nine days after the check was received and credited to the First National Bank. Record, page 75.

III.

ARGUMENT.

ONLY QUESTIONS OF LAW CAN BE DETERMINED UPON THIS RECORD.

It is solely by a writ of error that the judgment of the lower court and the proceedings had prior thereunto, are brought to this Court for review.

Record, p. 147.

It is insisted that notwithstanding the numerous assignments seeking to raise questions of fact, the only questions which can be reviewed under this writ of error, are limited strictly to those of law apparent on the record.

The practice of this Court in this regard is well settled, as will be seen from the language of Mr. Justice Story in the case of *Hyde v. Booraem*, 16 Peters, 169, as quoted in the opinion of the Supreme Court in the case of *Dower v. Richards*, 151 U. S., at page 664, to-wit:

“We have no authority, as an appellate court, upon a writ of error, to revise the evidence in the court, below, in order to ascertain whether the judge rightly interpreted the evidence or

drew right conclusions from it. That is the proper providence of the jury; or of the judge himself, if the trial by the jury is waived, and it is submitted to his personal decision."

For other authorities in point the Court is referred to *King v. West Va.*, 216 U. S., 100, and the cases collected by the Court in the case of *Dower v. Richards*, 151 U. S., 663.

But assuming, merely for the sake of argument, that opposing counsel had perfected an appeal from the judgment below and thereby endeavored to bring all questions of fact, as well as law, here for review, nevertheless, under the voluntary respective motions of counsel for peremptory instructions in the trial court, this Court would be, and is, prohibited from the consideration of but two questions, viz: First, Was there any evidence to support the court's finding of fact? and, secondly, Was the law correctly applied to those facts?

This is the view both of the lower courts took of the effect of the respective motions of counsel, and it will be shown that they were entirely correct.

Relative to his action upon the respective motions of counsel for peremptory instructions, the court very correctly and conclusively said in overruling the motion for a new trial:

“Both parties having requested the direction of the verdict unaccompanied by alternative requests for special instructions, it became the duty of the court to find the facts and direct a verdict thereon. *Merwin v. Magone* (C. C. A. 2), 70 Fed., 776; *Magone v. Origet* (C. C. A. 2), 70 Fed., 778; *Bradley Timber Co. v. White* (C. C. A. 2), 121 Fed., 779; *United States v. Bishop* (C. C. A. 8), 125 Fed., 181; *Phoenix Ins. Co. v. Kerr* (C. C. A. 8), 129 Fed., 723; *Mead v. Cheshborough Co.* (C. C. A. 2), 152 Fed., 998, 1002; *Anderson v. Messenger* (C. C. A. 6), 158 Fed., 250, 253; *Mead v. Darling* (C. C. A. 2), 159 Fed., 684; and *Beuttell v. Magone*, 157 U. S., 154, 157.”

“In *Beuttell v. Magone*, *supra*, the Supreme Court said that as ‘both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law,’ and that ‘this was necessarily a request that the court find the facts.’ ”

“In *Anderson v. Messenger*, *supra*, Judge Severens, delivering the opinion of the Circuit Court of Appeals for this circuit, said: ‘At the conclusion of the evidence, both the plaintiff and the defendant requested the court to charge the jury peremptorily, each in his own favor. . . . We are required by the opinion of the Supreme Court in *Beuttell v. Magone*, 157 U. S., 154, to hold that these mutual requests were the equivalent of a withdrawal of the facts from the jury and a submission of them for a finding by the court.’ ”

Record, p. —.

In this connection, and in addition to the numerous authorities cited by the lower courts, a short excerpt from the language of the Court of Appeals in the case of the *City of Defiance v. McGongale*, 150 Fed. Rep., 691, follows:

“At the conclusion of the testimony, both parties moved the court for a directed verdict. The court overruled that of the defendant, but sustained the motion of the plaintiff, and directed a verdict in his favor for the whole amount claimed in his petition with interest, and a verdict was returned accordingly. In its opinion in *Beuttell v. Magone*, 157 U. S., 154, 15 Sup. Ct., 566, 39 L. Ed., 654, the Supreme Court said: ‘As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof.’ This court has frequently enforced this rule, and in disposing of the case before us we are limited to the consideration of the correctness of the result reached by the trial court in its determination of the legal questions involved, as there was evidence to support the findings of fact.”

The principle announced in *Beuttell v. Magone*, has been consistently adhered to by this Court in the cases of *Gray v. Noholoa*, 214 U. S., 112; *Waters-Pierce Oil Co v. Texas* (1), 212 U. S., 97; *Minneapolis & St. L. R. Co. v. State of Minnesota*, 193 U. S., 563; *McKinley Creek M. Co. v. Alaska N. M. Co.*, 183 U. S., 563, and in the case of *Dooley v. Pease*, 180 U. S., 126, where this Court used this language:

“Errors alleged in the findings of a court are not subject to revision by the Circuit Court of Appeals, or by this Court, if there was any evidence upon which such finding could be made.”

As absolutely conclusive of this question, it is desired to quote the latest words from this Court on the subject, which are as follows:

“As both parties moved for a ruling, and as there was nothing more, according to *Beuttell v. Magone*, 157 U. S., 154, it stood admitted that there was no question of fact sufficient to prevent a ruling being made, and the motions together amounted to a request that the court should find any facts necessary to make it; so that unless the ruling was wrong as matter of law, the judgment must stand.”

Sena v. American Turquoise Co., 220 U. S., 497.

The decision in the case at bar has been followed by the Circuit Court of Appeals upon this point in the case of *Melton v. Pensacola Bank & Trust Co.*, 190 Fed. Rep., 128.

Especially should this rule be applied in this case, because at the conclusion of the general findings of fact and before the case was given to the jury, counsel for defendant were, at their request, allowed to suggest any additional facts which they thought ought to be found, and they requested only two additional findings, one of which was specifically found by the court, and the other was, in the main, found as requested.

Record, pp. 107 and 108.

But no other request was made for any of the other findings set out in the motion for a new trial or in the assignments of error.

Record, pp. 107, 108.

IV.

COUNSEL'S DESPERATE ATTEMPT TO AVOID THE DISASTROUS EFFECT OF THE RESPECTIVE REQUESTS FOR PEREMPTORY INSTRUCTIONS.

Realizing the disastrous effect of these respective motions, opposing counsel falsely intimate that we abandoned our motions for peremptory instructions in the following language, which is taken from their brief in the Court of Appeals:

“The defendant in error insisted that the two motions were ‘tantamount to taking the case from the jury, or as a demurrer to the evidence,’

and moved the court to 'take the case and consider it on the testimony.' *This, in necessary effect, was an abandonment of the motion for peremptory instructions by the defendant in error. The trial judge took this view of the matter, and so acted."*

We insist that the statement of counsel in italics is absolutely unwarranted, and the only way in which it can be accounted for or explained, is in the assumption that they considered their case in such a desperate and precarious condition as to justify them in resorting to any means, howsoever unjustifiable, in order to save it.

This record shows without the peradventure of a doubt that not only did counsel for plaintiff below *not* abandon their "motion for peremptory instructions," but that directly to the contrary they made *two motions for such instructions*—one at the conclusion of defendant's testimony (Record, p. 83), and another at the conclusion of all testimony (Record, pp. 103, 139, as corrected)—and there is absolutely nothing in this record to show that counsel ever abandoned, withdrew or modified either of them. But just the contrary is clearly shown to any fair mind from the statement of counsel for plaintiff below, which was made after their last motion for peremptory instructions had been made, which is in these exact words: That "their motion was to direct a verdict in favor of plaintiff for \$3,000, with interest

from May 24, 1904, the date the check was charged back." (Record, bottom page 103.) The language quoted in said brief as having been used by counsel for plaintiff below is composed of mere extracts from language used by them in the heat of argument, and at most it contains mere expressions of their opinions, as shown by the use of the adjective "tantamount," and of the adverb "as."

As to the *view* which his Honor, the trial judge, "took" of the effect of the motions for peremptory instructions, and furthermore, as conclusive of whether or not any of said motions made by counsel for plaintiff below were abandoned or waived, it is only necessary to read his language, which follows:

"Gentlemen of the Jury, both the plaintiff and the defendant have moved the court to give the jury peremptory instructions in this case in favor of the two sides, respectively, and under these two motions it becomes the duty of the court to find the facts *and give the jury pre-emptory instructions as to the verdict which they shall return.*"

Record, p. 104.)

How any person who professes to understand the English language in the least could honestly misconstrue this language of his Honor is inconceivable.

It is by such methods that opposing counsel attempt to avoid the effect of their voluntary action, in the trial court, of joining with us in asking "the court to instruct a verdict" by which "both affirmed

that there was no disputed question of fact which could operate to deflect or control the question of law."

In the first place, opposing counsel, in support of their argument that the court was not justified in its action upon the respective motions for peremptory instructions, quote a short extract from the opinion of the Supreme Court, in the case of *Beuttell v. Magone*, 157 U. S., 157, which is a small portion of the paragraph of said opinion from which it is taken. Counsel's motive will be readily seen from the reading of the exact language of the whole paragraph, which is as follows:

"The request, made to the court by each party to instruct the jury to render a verdict in his favor, was not equivalent to a submission of the case to the court, without the intervention of a jury, *within the intendment of revised statutes, Sections 649, 700. As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, thereby, concluded by the finding made by the court upon which the resulting instruction of the law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof. Lehnert v. Dickson, 148 U. S., 71; Runkles v. Burnham, 153 U. S., 216.*"

The extract used by opposing counsel, when read in connection with the language which immediately follows it in the same paragraph, will be seen to refer specifically and solely to the construction of the Federal statute therein mentioned and to have no such meaning as is attempted to be given it by opposing counsel. Again, they rely upon another short extract from an opinion in the case of *Menahan v. Grand Trunk West Ry. Co.*, 70 C. C. A., 463. But obviously the present case does not fall within the statement made by Judge Severens in that case, to the effect that the decision in *Beuttell v. Magone*, *supra*, "cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the party whose request is refused has coupled with his request other requests to particular aspects of the case, which repel the implication that the party had consented to a submission of the facts to the court," *since counsel's request for peremptory instructions in this case was not coupled with a request or requests for other special instructions*, "directed to particular aspects of the case." (Record, p. 112.) Furthermore, to hold otherwise would make the language used by Judge Severens in the later case of *Anderson v. Messenger*, 158 Fed. Rep., 250-253, wholly irreconcilable with that used by him in the earlier case just referred to. For in *Anderson v. Messenger* he said: "At the conclusion of the evidence, both the plaintiff and the defendant requested the court to charge the jury peremptorily, each in

his own favor. . . . We are required by the opinion of the Supreme Court, in *Beuttell v. Magone*, 157 U. S., 154, to hold that these mutual requests were the equivalent of a withdrawal of the facts from the jury and a submission of them for a finding by the court."

Opposing counsel in the Court of Appeals, for the first time, raised the question that our right to peremptory instructions was waived by introducing testimony in rebuttal.

It has been just shown as a matter of fact that there was no waiver by the defendants below of either of the motions, and that the court below so understood it.

In support of this contention, opposing counsel cite the cases of *Runkle v. Bernham*, 153 U. S., 216; *Union Pacific Railway Co. v. Snyder*, 152 U. S., 684, as holding that where a plaintiff at the conclusion of defendant's testimony makes a motion for peremptory instructions in its behalf which is not acted upon by the court, and the plaintiff thereupon introduces rebuttal testimony and after all other testimony is in and the case closed, said plaintiff renews or makes another motion for peremptory instructions, the said motion is waived by the introduction of testimony in rebuttal.

But a most casual examination of those authorities will show: First, that the motions in those cases were made by the defendants at the conclusion of the plaintiff's testimony, and were overruled, and afterwards the defendants introduced their testimony and *failed to make or renew their motions for peremptory instructions after all of the testimony was in and the case closed.*

It needs no elaboration to show that those authorities have absolutely no bearing upon the correctness of the action of the lower court upon the respective motions of the parties in this case.

It is confidently asserted that opposing counsel can not cite a case where the court holds that the introduction of testimony in rebuttal, after refusal of the trial court to pass upon a motion for peremptory instructions, defeats the plaintiff's right to make or renew its motion after the introduction of all the testimony and the case closed. But just the contrary principle is established by the Supreme Court of the United States in the case of *Robertson v. Perkins*, 129 U. S., 236, wherein it appears from the court's own language, that:

“At the close of the plaintiff's evidence, the defendant moved the court to direct a verdict for the defendant, on the further ground that the plaintiff had not shown facts sufficient to entitle him to recover. The motion was denied by the court and the defendant excepted to the

ruling. But, as the defendant did not then rest his case, but afterwards proceeded to introduce evidence, the exception fails." . . . "At the close of the testimony on both sides, the defendant moved the court to direct a verdict for him, on the grounds, that the plaintiff had not produced sufficient evidence to make a case." . . . The motion was denied by the court, and the defendant excepted to the ruling."

The court held that the defendant's motion to direct a verdict for him which was made at the close of the case, or his renewed motion, should have been granted by the trial court, and for this error on its part this Honorable Court reversed the judgment of the lower court and directed it to grant a new trial.

Not waiving or modifying our insistence that upon this record only pure questions of law apparent upon the face of the record can be considered, but simply assuming, merely for the sake of argument, that the question of the sufficiency and weight of the testimony upon which the findings of fact were based, was presented by the record, we have, in an appendix to this brief, carefully and laboriously shown that each and every finding of fact made by the trial court is supported by an abundance of uncontradicted testimony.

In order to show this correctly and conclusively, the findings of facts are correctly divided into natural paragraphs, and immediately following each of

said paragraphs is shown, by specific reference to the record, ample evidence to support each and every fact therein found. This showing will be found in appendix of our brief, and we are content to stand thereupon.

It is earnestly insisted that the foregoing authorities and reasons fully sustain the Court of Appeals, and the trial court in holding that the request by each party for peremptory instructions in its favor, under the circumstances disclosed by this record, amounts to an admission by both parties that the evidence was not in conflict, and to a request that the court determine the facts.

V.

THE COURT OF APPEALS' AND THE TRIAL COURT'S
LEGAL CONCLUSIONS UPON THE FINDINGS OF FACT
ARE SUPPORTED BY AN ABUNDANCE OF THE BEST
AUTHORITIES AND REASONS.

The lower courts held, as a matter of law upon the facts as found by it, that R. H. Plant and the First National Bank of Macon, Ga., both having running accounts and deposits in the American National Bank, the moment the latter bank received from the former bank the check of R. H. Plant for credit to the account of the First National Bank, and accepted

said check and credited the amount of said check to the account of the First National Bank, the transaction was closed and the relation of the creditor and debtor became established; and that the First National Bank of Macon had the right to immediately withdraw the amount of said check in the sum of \$3,000.00 from the American National Bank, which right still exists in the defendant in error in this case.

Record, pp. 107, 146.

In the case of *New York County Bank v. Massey*, 192 U. S., 145, Mr. Justice Day, in speaking of the relations between a depositor and a bank in regard to money deposited, said:

“The money deposited becomes a part of the general funds of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character, or, as defined by Mr. Justice White, in the case of *Davis v. Elmira Springs Bank*, 161 U. S., 275-288:

“‘The deposit of money by a customer with his banker is one of loan, with the super-added obligation that the money is to be paid, when demanded, by a check.’

“‘It is true that the findings of fact in this case establish that at the time these deposits

were made the assets of the depositors were considerable less than their liabilities, and that they were insolvent, but there is nothing in the findings to show that the deposit created other than the ordinary relation between the bank and its depositor. The check of the depositor was honored after this deposit was made, and for aught that appears, Stege Brothers might have required the amount of the entire account without objection from the bank, notwithstanding their financial condition.' "

The relationship between a depositor and his bank having been above shown by authorities, the next natural inquiry is, What are the rights of a depositor growing out of said relationship? Those rights as defined by the courts of last resort of several States and of the Court of Appeals and of the Supreme Court of the United States, are shown by excerpts from decisions below.

In the case of *Oddie v. Bank*, 15 N. Y., 735, it is said:

"Where a genuine check is drawn by one of its customers upon a bank is presented by the drawee to the bank for deposit, it is substantially a demand for payment. If the bank accepts and pays it, either by delivering the currency or giving the party credit for this deposit, the transaction is closed between the bank and such party, and where the account so presented was credited upon a deposit slip by the officers of the

bank, held: 'The bank became liable for the amount of the check, although on the same day and before the close of banking hours, but after it had deposited other checks of the drawer's presented later, it returned the check to the depositor as not good, although the account of the drawer was overdrawn at the time of the deposit.' "

In the case of *Bank v. Burns*, 68 Ala., 287, it was held:

"Where a contract is drawn by one of the bank's depositors in favor of another, is presented by the latter, and amount thereof is credited upon pass-book as deposit, and check placed on file of paid and cancelled checks, and afterwards amount of check is also entered to his credit and charged against drawer, these facts constitute a payment by bank of check, and amount cannot be withheld by bank on discovery that check was an overdraft and drawee insolvent."

Again, in the case of *Bank v. Gregg*, 138 Ill., 168, it was held:

"Where a bank accepts checks drawn on it, stamps same as paid, enters amount thereof to credit of holder presenting the check, this will be payment of check, although bank may fail to charge account of drawer with amount. Bank has no authority to charge back the amount."

Also in the following cases from different States, the same principle has been upheld, to-wit:

Levy v. Bank, 4 Dallas, 234; *Briggs v. Bank*, 89 N. Y., 182; *Board v. Robinson*, 81 Minn., 305; *Hoffman v. Bank*, 46 N. J. Law, 604; and *Daniel v. Bank*, 67 Ark., 223.

In the case at bar, the defendant below not only accepted the check in controversy, and mailed plaintiff notice of its action, but actually made entries upon their books to effectuate a transfer of the money from the account of the drawer to that of the payee, the First National Bank of Macon. At the time of this transaction both payee and drawer had running accounts with said defendant bank, and the drawer had sufficient funds on deposit with said defendant bank to pay said check.

Record, p. 106.

Upon this point the Court of Appeals for the Fifth Circuit, in the case of *Montgomery County v. Cochran*, 126 Fed. Rep., 456, held:

“When, in the absence of fraud, a check is presented in a bank by the payee and received as a deposit, and credited on his account in the bank, the check is paid. The transaction is the same in effect as if the cash had been handed to the payee, and by him returned to the bank. This result does not depend on the amount of the cash in the bank being equal to the check,

nor on the financial condition of the bank as shown later on a settlement of its affairs after insolvency.”

(*Italics ours.*)

In the case of *National Bank v. Burkhardt*, 100 U. S., 689, it appears that at an early hour in the forenoon the payee of the check handed it in at the bank upon which it was drawn, without a pass-book, as a deposit, and the same was taken by the receiving teller and simply laid aside.

It does not appear, as in this case, that the bank ever charged the amount of the check against the drawer or credited the amount to the payee, or that it notified the payee that such had been done.

The question was, whether under such circumstances the bank was liable to the payee for the amount of the check.

In answer to this question, this Court said:

“When a check on itself is offered to the bank as a deposit, the bank has the option to accept or reject it, or to receive it as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, *there being no fraud and the check genuine*, the parties are no less bound and concluded than in the former case. *Neither can*

disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned. It was well said by an eminent Chief Justice: 'If there has ever been a doubt on this point, there should be none hereafter.' *Oddie v. National City Bank of New York*, 45 N. Y., 735."

(Italics ours.)

It is proper to state here that the principle announced in this case has never been in the least modified by any subsequent decision of this Court, nor can a case be found in any of the Federal Courts adjudicated subsequent to the date of said decision wherein the court has failed to give full force and effect to said principle.

The foregoing numerous cases conclusively maintain the legal principle, applied by the lower court to the facts as found by it, to the effect that, "When in the absence of fraud, a check is presented to a bank by a payee and received as a deposit, and credited on his account in the bank, the check is paid," and the "bank has no authority to charge back the amount" of the check against the payee, as was done in this case.

It is, therefore, earnestly insisted that unless it conclusively appears upon this record that the agents or officers of the payee bank in this case were guilty

of fraud in their transactions with the plaintiff in error relative to the depositing of said check, the judgment of the lower court should be affirmed.

VI.

UNLESS IT CONCLUSIVELY APPEARS ON THIS RECORD THAT THE OFFICERS OR AGENTS OF THE PAYEE BANK IN THIS CASE WERE GUILTY OF ACTUAL FRAUD, THE JUDGMENT MUST BE AFFIRMED.

The only assignments of error which, in the slightest degree, can be said to raise a question of fraud, are assignments numbered 3, 3-A and 3-B. In fact, it is only claimed in their brief in this court that assignment No. 3 merely raises the question of payment under mistake of fact.

Neither of said assignments directly charge any positive act of fraud against any of the agents or officers of the First National Bank, but merely seek to inferentially establish fraud on its part by charging that as certain officers of said bank had knowledge of certain facts which are alleged to have been material to the plaintiff in error before and at the time the amount of the check in question was credited to said First National Bank, which they failed to communicate to plaintiff in error, was such bad faith on their part as to amount to fraud.

The substance of all of said assignments is that the defendant below "was ignorant of the insolvency, suspension, or bankruptcy of R. H. Plant when it made the book entries which are relied upon as a payment of the check in question, and when it mailed its letter of advice, and supposed that said Plant was solvent," whereas "on the other hand, the First National Bank, when it received said check," and "before said book entries were made and said letter of advice was mailed, knew that Plant was insolvent, had suspended the payment of his debts and the transaction of business, and that a petition in bankruptcy had been filed against him, and that said Plant was indebted to defendant in the sum of \$50,000.00."

In each of said assignments, it is solely alleged that as Messrs. Plant and Hurt, as officers of said First National Bank, had knowledge of the foregoing facts, their knowledge thereof is, in law, the knowledge of said bank, and upon this allegation is based the conclusion that "said bank, therefore, acted in bad faith in not communicating these material facts to the defendant."

The fatal fallacy of this conclusion lies in the false assumption that, under the facts and circumstances of this case, the alleged knowledge of either Plant or Hurt can be imputed to the First National Bank.

As to R. H. Plant's connection with or his direction of the affairs of the First National Bank at and

before the time of the receipt in question by it, the court found positively "that at the time this \$3,000 check was drawn, R. H. Plant was not at the bank and had not been there for some five or six weeks" (Record, p. 105), and "that he gave no specific directions in reference to this particular check to the officers of the First National Bank, who were conducting his affairs during his sickness." And, furthermore, as to whether or not the First National Bank had any actual knowledge of Plant's financial condition or his indebtedness to the plaintiff in error, the court unequivocally found the facts to be "that the officers and agents of the First National Bank of Macon, who were conducting *its* affairs during his sickness, and who received and accepted this \$3,000 check and forwarded it to the defendant bank, when they received and forwarded it, had no knowledge of Plant's insolvency, and that they furthermore had no knowledge of the fact that Plant was individually indebted to the American National Bank by reason of his \$50,000 of accepted drafts."

Record, p. 105.

As to Mr. Hurt, it is merely found that he was cashier of R. H. Plant's private bank and that he was a director and a member of the Finance and Executive Committee of the First National Bank.

Record, p. 107.

The court did not find, nor was it requested to find, nor was there any evidence to justify a finding, that he even knew or believed that Plant was insolvent or that he owed the plaintiff in error any amount, or that he had the slightest thing to do with the receiving, accepting, or forwarding of the check in question for or on behalf of the First National Bank.

It is well settled law that where the agent has knowledge of transactions which he gained in affairs in which he was acting for himself alone, and not for his principal, cannot raise a legal presumption of knowledge on the part of the principal.

Upon this proposition this court said in the case of *McCaskill v. U. S.*, 216 U. S., 514, that, “Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interests distinct from theirs. Their interests, it may be conceived, may be adverse to its interests, *and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that in transactions with it when their interest is adverse their knowledge will not be attributed to it.*

This principle has been well settled by many decisions of this Court, and of the Court of Appeals, and a few applications by the courts of this principle follow:

Louisville Trust Co. and others v. Louisville Railway Co., 75 Fed. Rep., 433, was a case in which certain bonds issued by a corporation was sought to be defeated upon the ground that the president of a company seeking to enforce said bonds had knowledge of their invalidity at the time the company took them. Judge Taft, in deciding that part of the case in which this point was involved, said:

“The Kentucky National Bank holds eighteen bonds. It acquired five as collateral to a loan of \$4,300, made January 9, 1890, to W. W. Jenkins; eight on a loan of \$7,200, to Osborne & Co., January 11, 1890; and five on a loan to William Cornwall, for \$3,500. These loans were all made by the bank, acting through its president, J. M. Fetter. Fetter was a director in the New Albany Company, and knew that no petition of the stockholders for the guaranty had been filed with the board. Under the rule laid down in the *Distilled Spirits* case and other cases cited above, the bank must be charged with notice of the defect in the guaranty, so far as the ten bonds received on the Jenkins and Cornwall loans are concerned. It appears, however, that Fetter was a part owner in the Osborne bonds, and that the loan was in part for his benefit. Under these circumstances we think that the bank cannot be affected with the knowledge of Fetter in that transaction, and it appears that the other directors of the bank had no knowledge of the defect at all. *Innerarity v. Bank*, 139 Mass., 332 (1 N. E., 282); *Read v. Doak*, 22 U. S. App., 669 (12

C. C. A., 643, and 65 Fed., 341); *Wilson v. Pauly*, 18 C. C. A., 475 (72 Fed., 129)."

In the case of *McCalmont v. Lanning*, 154 Fed. Red., 353, it was said:

"After examining the proofs, we are of opinion there was, under the proofs, no question to submit to the jury. Assuming, for the present purposes, that fraud was practiced on the defendant in securing from him the note for the stock of the Fraser Mountain Copper Company, and that Twining, the president of that company, had knowledge of that fact, still the mere fact that such officer was also president of the plaintiff company does not visit the latter with notice. There is nothing in the record tending to show that the trust company did not discount the note in good faith before maturity, or that Twining had anything to do with, or, indeed, knew of, its discount. Now, in *Willard v. Denise*, 50 N. J., Eq., 482 (26 Atl., 29; 35 Am. St. Rep., 788), it is held that to visit a bank with knowledge of its officer, gained in another relation, two things are necessary: First, possession by the agent of pertinent information; and, second, such agent's participation in the discount or purchase on behalf of the corporation. In view of that case and of *First National Bank v. Christopher*, 40 N. J. Law, 439 (29 Am. Rep., 262), and *Barnes v. Trenton Gaslight Co.*, 27 N. J., Eq., 33, we hold the trust company was not visited with the knowledge of its president,

Twining, and was, therefore, an innocent purchaser."

In the case of *Earle v. Mance*, 133 Fed Rep., 1008, it was said:

"The plaintiff moves for judgment for want of a sufficient affidavit of defense. The declaration is upon a bond executed by the defendant and another in favor of the plaintiff, and for an overdraft by check on the Chestnut Street National Bank, of which the plaintiff is now receiver. The defense is that the president of the Chestnut Street National Bank, prior to its failure, was also president of another institution in which the defendant had a deposit, and that the president of the Chestnut Street National Bank assured defendant of the soundness of this other institution, which assurance was afterwards found to be erroneous, and by reason thereof the defendant claims to have lost a sum in excess of the claim in this suit. Because the president of the Chestnut Street National Bank was the president of the other institution about which this erroneous information was furnished, the defendant attempts to set off his loss there against the claim here. This cannot be allowed."

In the case of *Union Central Life Insurance Co. v. Robinson*, 148 Fed. Rep., 358, the Circuit Court of Appeals for the Fifth Circuit said:

"There is, however, an exception to the general rule, which is as well established as the rule

itself. The rule has no application to a case where the agent is acting for himself, in his own interest, adversely to the interest of his principal. In such case the adverse character of his interest takes the case out of the operation of the general rule, because, first, he will be likely in such case, to act for himself, rather than for his principal; and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be, therefore, both unjust and unreasonable to impute notice by mere construction under such circumstances. *Thomson-Houston Electric Co. v. Capitol Electric Co.* (C. C.), 56 Fed., 849; *Frenkel v. Hudson*, 82 Ala., 158 (2 South., 758; 69 Am. Rep., 736)."

The antagonistic interest of Plant in this case was in the fact that it was to his advantage to suppress the knowledge of his insolvency as long as possible for the reason that if the First National Bank, through whom he had been negotiating his various loans and papers, was informed that he was insolvent, although he was the president of the bank, and possibly the managing director of the bank, yet it stands to reason that the stockholders of the First National Bank of Macon, who, under the law, are liable for double the amount of their stock, would immediately order the cashier of that bank to cease handling the paper of said Plant, and would also take steps to either put Plant in bankruptcy or to secure his indebtedness to said bank.

The inability of Plant to secure his indebtedness to said First National Bank is shown in the aftermath of the insolvency proceedings had in reference to I. C. Plant's Sons' Bank.

In the case of *Bank of Overton v. Thompson*, 118 Fed. Rep., 798, the Circuit Court of Appeals for the Eighth Circuit said:

“It is claimed on behalf of the complainant that as Hardinger certainly had full knowledge of complainant's interest in the cattle, and in the money for which Hardinger sold them, and as he was the cashier of the defendant bank, when, as such, he took into that bank the deposit made there by himself as an individual depositor, his knowledge of all the facts connected with the rights of the complainant to that money is imputable to that bank, under the well-settled general rule that the knowledge of an agent, or notice to an agent, while acting within the scope of his authority, is notice to his principal, because within that scope he is the *alter ego* of the principal, and because the law will presume that the agent has performed his duty to disclose to his principal all notice to himself necessary to his principal's protection or guidance. The officer of a corporation, like a cashier of a bank, is such agent. There are, however, well-settled exceptions to this rule, where notice or knowledge on the part of the agent will not be imputed to the principal, and one of these is ‘where the agent's relations to the subject-matter, or his previous

conduct, render it certain that he will not disclose it.' ” Mechem, Ag., section 721. “*In such cases the presumption is that the agent will conceal any fact which might be detrimental to his own interests, rather than that he will disclose it.* *Id.*, sec. 723; *Kochler v. Dodge*, 31 Neb., 329, 336 (47 N. W., 913; 28 Am. St. Rep., 518); *Bank v. Sharpe*, 40 Neb., 123, 127 (58 N. W., 734); *Benton v. Bank* (Mo.), 26 S. W., 975; *Bank v. Lovitt*, 114 M., 519 (21 S. W., 825). In the case last cited it is said:

“ ‘An officer of a banking corporation has a perfect right to transact his own business at the bank of which he is an officer, and in such transaction his interest is adverse to the bank, and he represents himself, and not the bank. The law is well settled that, when an officer of a corporation is dealing with it in his individual interest, the corporation is not chargeable with his uncommunicated knowledge of facts derogatory to his title to the property which is the subject of the transaction.’ ”

“Notwithstanding some dicta and one decision—*Bank v. Blake* (C. C.), 60 Fed., 78—to the contrary, it is fairly well settled that knowledge of an agent, actually concealed from his principal, while the agent is dealing with the principal on his own account, is not to be imputed to the principal, even though the agent, assuming to act as such, did whatever was done on the part of the principal in the transaction with

himself, if disclosure of the matter concealed would have had a tendency to defeat his purposes. His position would be as antagonistic to his principal, and his motive for concealment as great as, and easier of accomplishment than, if he were dealing with the principal directly, or with another agent."

(The italics are ours.)

Many other authorities directly in print may be found in Thompson on Corporations, at section 4657; Morawitz, Corporations (2d Ed., 504c; 1 Morse on Banks, 104; *Levy & Cohn Mule Co. v. Kauffman*, 114 Fed. Rep., 170; and *Wait v. Santa Cruz*, 89 Fed. Rep., 619.

Upon the foregoing authorities and reasons it is most earnestly insisted that both of the lower courts were correct in holding that there was no fraud on the part of the First National Bank in this case.

The decision in the case at bar has been followed by the Circuit Court of Appeals upon this point in the recent cases of *Skud v. Tillinghast*, 195 Fed. Rep., 5. and *Melton v. Pensacola Bank & Trust Co.*, 190 Fed. Rep., 126, 137.

VII.

THE DRAWER OF THE CHECK IN QUESTION HAD THE LEGAL RIGHT TO PAY THE FIRST NATIONAL BANK THE AMOUNT OF HIS BONA FIDE INDEBTEDNESS, IRRESPECTIVE OF WHETHER HE WAS SOLVENT OR INSOLVENT.

It is argued by opposing counsel that the First National Bank had no legal right to the check in question because Plant gave the same to it when he was insolvent and when he was indebted to the plaintiff in error.

There is no allegation or proof whatever that the trustee of Plant's estate ever recovered or attempted to recover, or charge to the account of the American National Bank the \$3,000.00 credited to the First National Bank of Macon.

The only loss or detriment suffered by the American National Bank, and the only loss alleged by them to have been suffered, is the fact that they would, if forced to pay to the First National Bank the money credited to its account, lose their doubtful right to set off and appropriate the amount of the check in controversy upon an indebtedness not yet due, which Plant owed them on his unsecured drafts.

It is submitted respectfully that the First National Bank, as a matter of law, did not have knowledge of any fact or circumstance at the time it paid said check, which it was either in good conscience, or in law, called upon to communicate to the plaintiff in error.

If the said bank had not been guilty of negligently taking and holding the unsecured drafts of Plant, their payment of his check could not have harmed them in the slightest degree.

It would be contrary to all reason and logic to say that a person who has a check cashed, having knowledge of facts which, if known to the drawee bank, would cause them to refuse payment, could be made in a suit to refund the amount paid by the bank, he having received the same in *entire ignorance* of the *peculiar condition of the business relations between the drawer and the bank* which would render a payment under the special circumstances detrimental to its interests. *The bankruptcy of Plant could not have been detrimental to defendant had they not held his unsecured drafts.*

Is the depositor in a bank to bear the burden and risk of the bank which takes the unsecured drafts of another of its depositors under such circumstances? Suppose Plant, instead of having gone into bankruptcy, was simply about to depart perma-

nently from the country for residence in South America or some other foreign land, and plaintiff, after having accepted and forwarded the check in question, had learned of his intended departure and cashed the same in the identical way it did, and after Plant's departure the American National Bank had sought to appropriate the money upon its drafts on the ground that payee should have informed them of that fact, would anybody say they would have the right to retain it? Are customers presumed to know all the negligent loans made by the bank, and upon that hypothesis notify them of all circumstances which could in any way be of detriment to them? The burden would be intolerable and payment by check practically worthless.

Furthermore, as heretofore stated, Plant owed the First National Bank of Macon a sum in excess of the amount of this check. That he issued his check upon the American National Bank, in which he had funds sufficient to meet said check in favor of the First National Bank of Macon in payment of a *bona fide* indebtedness existing between Plant and said First National Bank.

Plant had the legal right to pay the First National Bank this *bona fide* indebtedness, irrespective of whether he was solvent or insolvent, and it was not incumbent upon Plant, much less the First National Bank of Macon, to inform the American National Bank of his insolvency.

He had the same right to issue this check upon the American National Bank, in which bank he had sufficient funds to meet the same and give it in payment to the First National Bank of his indebtedness to that bank as he would have had the right to have gone into his pocket and taken out of it \$3,000 in cash to pay said bank.

In the last event, neither the American National Bank nor any of his other creditors could either impeach the validity of the transaction or recover from the American National Bank the amount of said money so paid to the First National Bank. There being nothing illegal in such transaction, and Plant having a legal right to pay any of his debtors that he saw proper the amount of their indebtedness in full, no one can complain of such legal transaction, there being no fraud in fact or in law attending such transaction.

In other words, he had a perfect right in law, if he saw fit, to prefer the First National Bank as to any other creditor, and to pay that bank in full his indebtedness, and such payment would work no injury that is actionable to his other creditors.

If the insolvency of Plant and the further fact were known to the American National Bank that he (Plant) intended to prefer the First National Bank and take from his estate a sufficient amount of funds to pay the First National Bank of Macon his entire

indebtedness, neither the American National Bank nor any of his creditors could even, by injunction, maintain a suit against him to enjoin him from making such a payment, or preference, as you may see proper to call it.

160 U. S., 149, *Bamberger v. Schoolfield*.

144 U. S., 595, *Crawford v. Neal*.

If the above propositions are sound, it naturally follows that it was not the duty either of Plant or of the First National Bank of Macon to have given notice to the American National Bank of Nashville, Tennessee, of the insolvency of Plant.

Therefore, it is confidently submitted that the alleged knowledge of Plant and Hurt of the material facts set forth in plaintiff in error's said assignments under the numerous authorities above quoted, and the foregoing application of the facts of this case thereto, cannot be imputed to or charged against the First National Bank, and this being so, it must necessarily follow that opposing counsel's conclusion that said First National Bank acted in bad faith in not communicating such knowledge to the plaintiff in error, which is based thereupon, must be false.

As said assignments are the only ones to be found in this record that under any construction it can be even argued that any of the agents or officers of the First National Bank were guilty of fraud in their transactions or dealings with the plaintiff in error,

relative to the receipt and forwarding of the check in question, upon the authority of the case of *National Bank v. Burkhardt*, 100 U. S., 689, and the numerous Federal Court decisions heretofore cited, the judgment of the lower court should be affirmed.

VIII.

TO TAKE AN AMOUNT FROM THE ACCOUNT OF ONE DEPOSITOR AND APPLY IT TO THE INDEBTEDNESS OF AN INDEPENDENT DEBTOR OF THE BANK, IS REVOLUTIONARY.

Under assignments one, two, and three, the single claim is made that plaintiff in error was entitled to repudiate its payment of the check in question, because it was made in ignorance of Plant's insolvency or bankruptcy, and that therefore it had the right to take the amount of said check which it had so paid and apply it to the payment of Plant's drafts.

(Record, p. 148.)

Said claim involves two propositions of law, both of which must be resolved in favor of plaintiff in error before said claim can be maintained. The first is whether or not, under the facts as found by the court, the plaintiff in error was entitled to repudiate payment of said check because of its ignorance of

said facts; and the second, and dependent proposition, is, assuming that it did have the right, did it have the further right to apply the amount of said check to the payment of said drafts? We insist that neither of said propositions can, nor have been established.

In order to properly consider this proposition in the light of the facts as found by the court and its legal conclusions thereupon, which have been heretofore fully discussed, it will be necessary to state the substance and effect of what has been heretofore shown, namely, that under the authority of the Burkhardt case and numerous other authorities in Section V of this brief, the entries made by the American National Bank upon its books constituted the payment of so much money in actual cash to the First National Bank of Macon, Ga., by the said American National Bank out of the funds of R. H. Plant in its hands as a depositor of said bank.

Neither Plant nor the American National Bank had any control of that money as the money of R. H. Plant. The indebtedness of the American National Bank to R. H. Plant was thereby diminished to the extent of \$3,000.00 when his account was charged with \$3,000.00 and the First National Bank's (of Macon) account was credited with said amount. In other words, the transaction between Plant and the American National Bank was closed and perfected literally by virtue of the actual entries made by the

American National Bank and legally in accordance with usual customs and laws governing banking institutions. In other words, the moment the entries were made upon the books of the American National Bank, the title to said \$3,000.00 of money passed from the American National Bank and R. H. Plant and immediately vested in the First National Bank of Macon, Ga., and thereby became a transaction not between Plant and the American National Bank, but a transaction between the First National Bank of Macon, Ga., an entirely independent, different and innocent third party, and the American National Bank of Nashville.

This fact has been entirely overlooked or disregarded by opposing counsel from the beginning of this litigation to the present time, as shown from the argument and cases cited in support thereof by them between pages — and — of their brief filed in this court. For an examination of said cases will reveal that all of them involved the right of setoff, or the right to repudiate a payment made under a mistake of facts *merely and solely between original or primary parties before the rights of innocent third parties have intervened*, such as between the drawer and drawee of checks, mortgagor and mortgagee, assignor or assignee, etc.; or where the check in question had never been accepted, or where the check was not genuine, or where there was fraud on the part of the holder of the check. As an illustration

of this we will take the principal case cited of *Bank v. Whitman*, 94 U. S., 343, which is repeatedly referred to by counsel.

In order to show that this case furnishes absolutely no authority in support of plaintiff in error's extraordinary claim in this case, it is hardly necessary to do more than to quote the following language of the court:

“The question is this: Can the *payee of a check*, whose endorsement *has been forged* or made without authority, and when payment has been made by the bank on which it was drawn, upon such an unauthorized endorsement, maintain a suit against the bank to recover the amount of the check? We think it is clear, both upon the principle and authority, that the *payee of a check unaccepted* cannot maintain an action upon it against the bank on which it is drawn.”

Unlike this case, it was not claimed, nor could it have been claimed, in that case, that the rights of an innocent third party had intervened, and furthermore, the bank in that case had never accepted the *lawful* holder's check for payment, nor had it ever credited the amount of the check to the lawful holder thereof, as was done in this case. The only thing which the bank did in that case was caused by the criminal act of a forger, which caused said bank to wrongfully pay the amount of said check to him, but there is no claim in this case that any agent or officer

representing the First National Bank in the transaction relative to this check was guilty of anything resembling a criminal act. Furthermore, the defendant in error in this case is not, like the payee in that case, asking the bank to pay the amount of the check in question twice.

The Whitman case does not hold, nor can, or have opposing counsel cited a case that holds where a *bona fide* holder for value acquires a check, and that check is presented by such *bona fide* holder, and the amount of the check is paid such holder, or put to his credit in such bank, that such a transaction between the bank and the payee of the check, after the same has been closed and the amount so paid to the payee of the check, can be repudiated, or that such amount could be recovered from the payee of the check by the bank paying said check, nor can they cite a case giving the bank under such circumstances the right to setoff as against such third party.

But on the other hand, there are many authorities of the highest character which hold that such cannot be done, and notably is the case of *Hoffman v. Bank of Milwaukee*, 12 Wallace, 181, decided by the Supreme Court of the United States, where the bank had discounted drafts drawn by parties at Milwaukee on Hoffman & Co., to which were attached bills of lading purporting to represent shipments of flour. Hoffman & Co. accepted and paid the drafts. The bills of lading proved to be forgeries, and Hoff-

man & Co. sued the bank to recover the money paid. It was contended that they had accepted and paid the drafts in the belief that the accompanying bills of lading were genuine, and that, *had they known the real facts*, they would not have accepted and paid the drafts, and could not have been compelled to do so, in which case the loss would have fallen on the bank; that, is, that they *paid the drafts under a mistake of facts*. But the court answered:

That money paid as in this case by the acceptor of a bill of exchange to the payee of the same, or to a subsequent endorser in discharge of his legal obligation as such, is not a payment by mistake, nor without consideration, UNLESS IT BE SHOWN THAT THE INSTRUMENT WAS FRAUDULENT IN ITS INCEPTION, OR THAT THE CONSIDERATION WAS ILLEGAL, OR THAT THE FACTS AND CIRCUMSTANCES WHICH IMPEACH THE TRANSACTION AS BETWEEN THE ACCEPTOR AND THE DRAWER WERE KNOWN TO THE PAYEE OR SUBSEQUENT ENDORSEE AT THE TIME HE BECAME THE HOLDER OF THE INSTRUMENT."

The court further held that "different rules apply between the immediate parties to a bill of exchange—as between the drawer and acceptor, or between the payee and the drawer—as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that

consideration fails, proof of that fact is a good defense to the action. But the rule is otherwise between the remote parties to the bill—as, for example, between the payee and the acceptor, or between the endorsee and the acceptor—as two distinct considerations come in question in every such case where the payee or endorsee became the holder of the bill before it was overdue and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability, and, secondly, that which the plaintiff gave for his title, and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence of failure of both these considerations.”

“Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where the suit is in the name of a remote endorsee against the acceptor, that if any intermediate holder between the defendant and plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff.”

The court further said:

“The failure of consideration, as between the drawer and acceptor of a bill of exchange, is no

defense to an action brought by the payee against the acceptor, if the acceptance was unconditional in its terms, and it appears that the plaintiff paid value for the bill, even though the acceptor was defrauded by the drawer, unless it be shown that the payee had knowledge of the fraudulent acts of the drawer before he paid such value and became the holder of the instrument."

Again, the same high tribunal in the case of *Goetz v. Bank of Kansas City*, 119 U. S., 551, where an acceptor of a bill of exchange discounted by a bank, with a bill of lading attached, which the acceptor and the bank regarded as genuine at the time of the acceptance, but which turned out to be a forgery, held: that the acceptor is bound to pay the bill to the bank at maturity, and that the bad faith in the taker of negotiable paper which will defeat a recovery by him must be something more than a failure to inquire into the consideration or circumstances upon which it was made, issued or accepted. These highest of authorities clearly establish the principle that, as between remote "*parties secondarily liable on commercial paper—e. g., acceptors or drawee and payees—money paid to the latter cannot be recovered back unless it is shown that there was fraud and a failure of consideration which was known to the payee at the time he acquired the paper.*"

As there has never been any dispute about the First National Bank being the payee of the check in

question, and as it was specifically found by the court that none of the agents or officers of that bank at the time they received or accepted said check, and forwarded the same to the plaintiff in error, knew of Plant's insolvency or bankruptcy, or of his owing plaintiff in error anything (Record, p. 105), and as it is not claimed that said First National Bank had any other knowledge which would affect its title to said check, it is earnestly insisted that upon the principle established by said authorities the plaintiff in error has no right to retain the amount of the check in question, which it credited or paid to said First National Bank.

Opposing counsel have not cited a case that holds that where a *bona fide* holder for value acquires a check, and that check is presented by such *bona fide* holder, and the amount thereof paid said holder, or put to his credit in such bank, that such a transaction between the bank and the payee of the check can be repudiated, or that such amount could be recovered from the payee of a check by the bank paying said check; nor can they cite a case giving the bank the right of setoff as against a third party under such a state of facts, for such a decision would be revolutionary.

IX.

ASSIGNMENT NO. 1, RAISING THE QUESTION OF "WANT OF PRIVACY," IS NOT SUPPORTED BY ANY AUTHORITY, LOGIC OR FACTS.

The assignment above mentioned, raising the question of want of privacy between the First National Bank and the Plaintiff in error, is based solely upon what opposing counsel claim to be an authority found in the case of *First National Bank v. Whitman*, 94 U. S., 343, and other cases, which are entirely alike in so far as the condition and relationship of the parties and the principles involved are concerned.

It being fully shown in preceding Section VIII how said cases differ in many material respects from the one at bar, and why they have no bearing upon the question now at issue, consequently it is deemed unnecessary to consume further time in the discussion thereof.

In this connection it is only desired to say that in the case at bar Defendant below not only accepted the check in controversy and mailed the First National Bank of Macon notice of its acceptance, but actually made the entries upon their books to effectuate a transfer of the money from the account of the drawer

to that of the payee, the First National Bank of Macon. At the time of this transaction both payee and drawer had running accounts with the Defendant bank, and the drawer had sufficient funds on deposit with the bank to pay the check.

With this in mind, it is only necessary to again refer to the language of the Supreme Court of the United States, in the case of *National Bank v. Burkhardt*, 100 U. S., 589, which has been fully considered in preceding Section V, together with other numerous authorities in point, viz.: "When a check upon itself is offered to the bank, as a deposit, the bank has the option of accepting or rejecting it, or accepting it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit, and accepted as a deposit, *there being no fraud, and the check genuine*, the parties are no less bound and concluded than in the former case. *Neither can disavow or repudiate what has been done.* The case is merely one of an executed contract. There are the requisite parties, requisite consideration and the requisite concurrence and assent of the minds of those concerned."

Upon the faith of this decision of this Honorable Court, we contend that privity arose between the First National Bank of Macon and the plaintiff in error, as soon as the check in question was received

and accepted by the plaintiff in error as a deposit, because we have shown in Section VI that there was no fraud and because it was not denied that the check was genuine.

X.

ALL QUESTIONS EMBODIED IN THE ASSIGNMENTS OF
ERROR, AS TO THE WEIGHT AND CONSTRUCTION
OF TESTIMONY, SHOULD BE WHOLLY
DISREGARDED.

Assignment of Error No. 3c, complains that the trial Court *misconstrued* certain testimony, and Assignment No. 3d, merely sets forth how that particular *testimony should have been construed* and applied by the Court. It is only necessary to say in this regard that, as has been shown in Section III of this Brief, under the most favorable construction for the Plaintiff in error of the effect of the respective motions of counsel for peremptory instructions, we are limited at least to the question whether or not there was any evidence to support the Court's findings of fact. It is only formally charged that there is no evidence to support the findings of fact, but there is no serious attempt made to support such charge with argument, or specific citations. Whereas, in the appendix it is elaborately and conclusively shown that each and every finding of fact is supported by

ample evidence. Furthermore, at the conclusion of the general finding of facts and before the case was given to the jury, counsel for plaintiff in error were, at their request, allowed to suggest additional facts to be found, but they failed to even suggest that the Court consider the findings of fact embodied in said Assignments.

Assignment No. 3b charges that Mr. Hurt knew of the indebtedness of R. H. Plant to the plaintiff in error, and that his knowledge amounted to knowledge on the part of the First National Bank. Mr. Hurt was not called as a witness, and there is absolutely no proof in this record that he knew of such indebtedness. He did not keep Plant's books, and the Court refused to find as a fact that he did have such knowledge. But as he was acting solely and exclusively for Plant's Sons' Bank and R. H. Plant personally, in all transactions surrounding the handling of the check in question, if he should have had such knowledge it could have been imputed only to Plant's Bank or to Plant personally.

For these reasons it is insisted that said assignments should be wholly disregarded, and especially because the latest decision of this Honorable Court upon the legal effect of similar motions to those in this case, positively holds that unless the ruling of the trial court was wrong, *as a matter of law*, the judgment must stand.

Sena v. American T. Co., 220 U. S., 497.

XI.

WHERE ONE OF TWO PERSONS MUST SUFFER LOSS, HE
SHOULD SUFFER WHOSE ACT OR NEGLECT
OCCASIONED THE LOSS.

In regard to the duty of the bank upon whom a check is drawn with relation to the rights of the payee of the check to, even later on during the same day, treat a check which had been received by the receiving teller and laid aside for deposit as paid, or not, as it pleased, this Honorable Court, in the Burkhardt case, said:

“If the bank proposed to hold the check on conditions, it was but fair and just to the other party (the payee) to have said so when it was received, and thus have given him the option, after such notice, to do with it as he might think proper. The saving or loss of the amount to the payee might have depended on the promptitude and knowledge of their conduct. Delay until after bank hours might have determined the result inevitably against them. It would be contrary to plainest principles of reason and justice to permit a bank under such circumstances, to shift the burden of the loss from itself to the shoulders of an innocent depositor.”

Opposing counsel have not cited any case that holds that where a *bona fide* holder for value acquires a

check, and that check is presented by such *bona fide* holder, and the amount thereof paid said holder, or put to his credit in such bank, that such a transaction between the bank and the payee of the check can be repudiated, or that such amount could be recovered from the payee of a check by the bank paying said check; nor can they cite a case giving the bank the right of setoff as against a third party under such a state of facts.

The only loss or detriment suffered by the American National Bank, and the only loss alleged by them, is the fact that they would, if forced to pay this money, lose the right to setoff and appropriate it to an indebtedness, which at the time was not due, that Plant owed them upon his unsecured drafts held by them.

This was a fact and circumstance of which Plaintiff below was entirely ignorant, and there is not the slightest evidence tending to show that the First National Bank had any knowledge, or cause to believe the Defendant below held unsecured drafts or other evidence of indebtedness against Plant, the drawer of the check in question. Any injury, if any there be, to the American National Bank, was caused by its own deliberate and premeditated negligence in accepting unsecured drafts to the amount of \$50,000.00 drawn by I. C. Plant on himself and accepted by him, and if the Defendant had not been guilty of

such negligence, their payment to the First National Bank of Macon, of his check of \$3,000.00, could not have harmed them in the slightest degree.

It would be contrary to all reason and logic to say that a person who has a check cashed, having knowledge of facts which, if known by the drawee bank, would cause them to refuse payment, could be made to refund the amount so paid by the bank, he having received the same in entire ignorance of peculiar conditions of the business relations between the drawer and the bank.

Especially when such conditions are brought about by the deliberate action on the part of the bank. Such holding would cast upon the depositor of a bank the entire burden and risk of the bank upon all of its bad or unsecured paper. It casts a presumption of knowledge upon the customer of the bank upon the legality, as well as to the value, of all the loans made by the bank. It would create the relationship of general investigator in every depositor, of all the paper of every character held by the bank, which might be acquired by such depositor on that particular bank.

XII.

A JUST DEBT COULD NOT HAVE BEEN CONCEIVED IN FRAUD OR DISCHARGED IN INIQUITY.

Counsel for both parties have solemnly, formally and conclusively confirmed in this cause as follows: "That on May 14, 1904, R. H. Plant was *justly indebted* to the First National Bank of Macon, Georgia, in the sum of Three Thousand (\$3,000.00) Dollars." Stipulation of Agreed Facts, Record, page 2.

And it was in accordance with said stipulation of counsel that the trial Court found the following facts: "I further find as a fact, from the proof, that the \$3,000.00 check drawn by Plant was *taken* by the First National Bank of Macon, Georgia, as a credit on a balance of a much larger amount *that R. H. Plant then owed the First National Bank, of Macon, Georgia.*" Record, page 105.

A "just debt" is only popular substitute for the longer phrase, "righteous obligation." The adjective "just" has exactly the same meaning and import as the words righteous, true and upright. Therefore, a debt that is admitted and found by the Court to be a just, upright and righteous debt, cannot be proven to be a debt that was conceived in fraud and discharged in iniquity.

Yet opposing counsel, without any assignment of error to support it, and for the first time in this Court, uses much space and argument in his Brief, in the futile attempt to show that Plant gave the check in question to the First National Bank for the fraudulent purpose of denying to the plaintiff in error the right to apply the amount of said check towards the payment of Plant's indebtedness to it, and that the First National Bank, in furtherance thereof, fraudulently concealed at the time the check was presented to and paid by the plaintiff in error, the knowledge that Plant was so doing and was insolvent.

But we insist that opposing counsel is estopped by his solemn admission and the Court's finding to the contrary, from making such a claim and that this Honorable Court, in pursuance thereof, should wholly disregard any such claim or argument.

CONCLUSION.

Counsel have cited in this case several decisions of the Courts of Georgia and other States upon similar questions to the one involved in this case. The question presented to this Court is one based not upon the law of the State of Georgia, but upon the common law of the country, and the cases are in accord to the effect "that the conclusion of a State Court as to what is the law upon a subject is not binding upon the United States Courts when based, not upon a statute of the State, but upon the view taken by the State Court of the common law of the subject."

Murray v. C. & N. Rwy. Co., 92 Fed. Rep., 868;

Railway Co. v. Baugh, 149 Fed. Rep., 368;

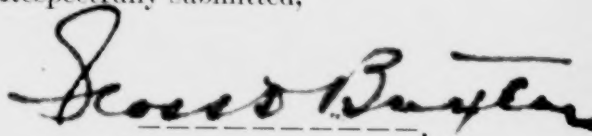
Levy v. Selwan, 11 Wall., 244;

Clerk v. Beaver, 139 U. S., 96.

But opposing counsel have not cited any case that holds that where a *bona fide holder* for value acquires a check, and that check is presented by such *bona fide holder*, and the amount thereof paid said holder, or put to his credit in such bank, that such a transaction between the bank and the payee of the check can be repudiated, or that such amount could be recovered from the payee of a check by the bank paying said check; nor can they cite a case giving the bank the right of setoff as *against a third party* under such a state of facts.

Therefore we respectfully submit that under none of the theories advanced by the Plaintiff in Error is it entitled to retain the proceeds of this \$3,000.00 check, but that, on the contrary, it is indebted to the Defendant in Error to the amount of said check, together with interest from July 25, 1907, the date upon which suit was brought, and consequently the judgment of the lower Court should in all things be affirmed.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Harold B. Buxton". The signature is written in dark ink and is positioned above a horizontal dashed line.

Attorney for Defendant in Error.

APPENDIX.

Not Only Have the Findings of Fact Evidence to Support Them, But They Are Conclusively Established by Admitted Facts and Uncontradicted Testimony.

In order to show correctly every fact that was found by the lower Court, each paragraph of the Transcript of the Court's finding as set forth in full in the record is quoted, and immediately following every paragraph wherein facts are found is shown what evidence is in the record to support the same.

The following is the first paragraph of the Court's finding:

"Gentlemen of the Jury, both the Plaintiff and the Defendant have moved the Court to give the jury peremptory instructions in this case in favor of the two sides, respectively, and under these two motions it becomes the duty of the Court to find the facts and give the jury peremptory instructions as to the verdict which they shall return."

As no fact or facts are found by the Court in that paragraph it will not be further noticed.

The second paragraph follows:

"I am of the opinion that, in so far as the *prima facie* case of the Plaintiff is concerned, the Plaintiff has made out his case by the weight of the evidence and practically the undisputed evidence

and so find as a fact, that the Plaintiff has proved the material facts alleged in the declaration, in so far as they are necessary to make out the Plaintiff's *prima facie* case in reference to the three thousand dollar check in question, and the crediting that check to the First National Bank, Macon, Ga., of which Plaintiff is the agent, so that, unless the defenses set up by the Defendant bank in its pleadings, are made out by the proof and are well founded in point of law, the Plaintiff would be entitled to a verdict for three thousand dollars with interest from the time that demand was made for the payment of the check and refused by the Defendant bank."

In order to show conclusively that "every material fact alleged in the declaration" and found by the Court in the foregoing paragraph, to be facts, is not only amply supported by the evidence, but is admitted by opposing counsel to be true, the facts as alleged in the declaration (Record, pp. 114, 115, 116, 117, 118), are set forth in a column below and directly opposite thereto are to be found facts taken separately from the agreed statement of facts as printed in the Record (pages 2, 3 and 4):

Facts in Declaration.

"The Plaintiff, A. L. Miller, as agent for the First National Bank of Macon, Georgia, a banking corporation duly formed, chartered, organized and existing under and by virtue of the laws of the United States, and a citi-

Facts in Stipulation.

"I. That A. L. Miller, the Plaintiff in this cause, is agent for the First National Bank of Macon, Georgia, which bank is a banking corporation, duly formed, chartered, organized and existing under and by virtue of the

*Facts in Declaration—
Continued.*

zen of the State of Georgia, and of the United States of America, by his attorneys, complains of the Defendant, the American National Bank of Nashville, Tennessee, a banking corporation, duly formed, chartered, organized and existing under and by virtue of the laws of the United States of America, and a citizen of the State of Tennessee; a citizen of the United States of America; and inhabitant of the Middle District of Tennessee, and says:"

(1st para. Declaration.)

"1st Count: Plaintiff avers that on May 14th, 1904, and for some time prior thereto, both said First National Bank of Macon, Georgia, and R. H. Plant, also of Macon, Georgia, were respectively depositors in, and kept running accounts with the aforesaid Defendant, the American National Bank of Nashville, Tennessee, and that said R. H. Plant on that date had to his credit in said Defendant Bank more than

*Facts in Stipulation—
Continued.*

laws of the United States; and is a citizen of the State of Georgia and of the United States of America.

"II. That the American National Bank of Nashville, Tennessee, the Defendant, is a banking corporation, duly formed, chartered, organized and existing under and by virtue of the laws of the United States, and is a citizen of the State of Tennessee and of the United States of America, and is an inhabitant of the Middle District of Tennessee; and that as such corporation it has a right to do a general banking business."

"III. That on May 14, 1904, and for some time prior thereto, the First National Bank of Macon, Georgia, and R. H. Plant, also of Macon, Georgia, were respectively, depositors in and kept running accounts with the Defendant, the American National Bank of Nashville, Tennessee, and that said R. H. Plant, on the 14th day of May, 1904, had to his individual name and credit, in the American National Bank of

*Facts in Declaration—
Continued.*

the sum of three thousand dollars.”

(2d para. Declaration.)

“Plaintiff further avers that on May 14th, 1904, said R. H. Plant, being justly indebted to said First National Bank of Macon, Georgia, drew his check on said American National Bank of Nashville, Tennessee, in favor of said First National Bank of Macon, Georgia, in the sum of three thousand dollars, and delivered said check to said First National Bank of Macon, Georgia, in payment of the aforesaid indebtedness, which check said First National Bank of Macon, Georgia, endorsed and forwarded the same through the mails to said Defendant bank, with instructions to place the same to the credit of said First National Bank of Macon, Georgia, on the books of said Defendant bank.”

(3d para. Declaration.)

*Facts in Stipulation—
Continued.*

Nashville, Tennessee, more than three thousand (\$3,000) dollars.”

“IV. That on May 14, 1904, R. H. Plant was justly indebted to the First National Bank of Macon, Georgia, in the sum of three thousand (\$3,000.00) dollars.

“That on said 14th day of May, 1904, R. H. Plant drew his check on the Defendant in the said American National Bank of Nashville, Tennessee, made payable to and in favor of the First National Bank of Macon, Georgia, in the sum of \$3,000.00, and delivered said check to said First National Bank of Macon, Georgia, in payment of the aforesaid indebtedness.”

“V. That said check so delivered to the First National Bank of Macon, Georgia, was by said First National Bank of Macon, Georgia, endorsed and forwarded, together with instructions, through the United States mails, on that date to the American National Bank, the Defendant, to place the same to the credit of the First National Bank of

*Facts in Declaration—
Continued.*

"Plaintiff further avers that said Defendant bank received said check on May 16, 1904, and in accordance with the aforesaid instructions, on the aforesaid date, placed the amount of said check to the credit of the First National Bank of Macon, Georgia, and charged the amount thereof against said R. H. Plant, the drawer of said check as aforesaid, and on said date duly notified said First National Bank of Macon, Georgia, to that effect."

(4th para. Declaration.)

"Plaintiff further avers that on or about May 16, 1904, said First National Bank of Macon, Georgia, became insolvent; that on or about said date Walter F. Albertson was duly appointed receiver of said bank by the

*Facts in Stipulation—
Continued.*

Macon, Georgia, on the books of the Defendant, the American National Bank of Nashville, Tennessee."

"VI. That the American National Bank, the Defendant, received said check on Monday, May 16, 1904, and, in accordance with the instructions sent it by the First National Bank of Macon, placed the amount of said check on its books to the credit of the First National Bank of Macon, Georgia, and charged the amount thereof against R. H. Plant, the drawer of said check, and on said date, viz.: May 16, 1904, duly notified the First National Bank of Macon, Georgia, through the United States mails, to that effect. That on May 16, 1904, a petition in bankruptcy was filed against R. H. Plant, at 11 45 o'clock a. m."

"VII. That on May 16, 1904, said First National Bank of Macon, Georgia, was insolvent; that on the same date Walter F. Albertson, was duly appointed receiver of said Bank by the Comptroller of the Currency, under the

*Facts in Declaration—
Continued.*

Comptroller of the Currency, under the provisions of Section 5234 of the Revised Statutes of the United States and Section 1 of the Act of Congress of June 30, 1876, Chapter 156; that on July 20, 1904, said Albertson resigned as said receiver and W. J. Butler was duly appointed by said Comptroller of Currency to succeed said Albertson as receiver aforesaid; that on or about July 1, 1906, B. M. Davis was duly elected and qualified as agent of said bank under and by virtue of Section 3 of the Act of Congress of June 30, 1876, Chapter 156, to succeed said last mentioned receiver, and to continue the winding up of the affairs of said bank; and that on or about July 9, 1906, said Plaintiff, A. L. Miller, was duly elected and qualified as agent of the said bank and by virtue of Section 3 of the Act of Congress of June 30, 1876, Chapter 156, to succeed said Davis as agent as aforesaid and to continue the winding up of the affairs of said bank."

(5th para. Declaration.)

*Facts in Stipulation—
Continued.*

provisions of Section 5234 of the Revised Statutes of the United States and Section 1 of the Act of Congress of June 30, 1876, Chapter 156; that on July 20, 1904, said Albertson resigned as such receiver and W. J. Butler was duly appointed by the Comptroller of the Currency to succeed said Albertson as receiver; that on or about July 1, 1906, B. M. Davis was duly elected and qualified as agent of said bank under and by virtue of Section 3 of the Act of Congress of June 30, 1876, Chapter 156, to succeed W. J. Butler as receiver of said First National Bank of Macon, and to continue the winding up of the affairs of said bank; and that on or about July 9, 1906, the Plaintiff, A. L. Miller, was duly elected and qualified as agent of the First National Bank of Macon, under and by virtue of Section 3 of the Act of Congress of June 30, 1876, Chapter 156, to succeed said Davis as agent aforesaid, and to continue the winding up of the affairs of said bank."

*Facts in Declaration—
Continued.*

"Plaintiff further avers that under and by virtue of his election and qualification as agent of said First National Bank of Macon, Georgia, as aforesaid, he became vested with the title to and entitled to the possession of all of said insolvent bank's property and assets and empowered to bring suit for the purpose of obtaining the same and collecting and receipting for the amount of said check."

(6th para. Declaration.)

"Plaintiff further avers that said R. H. Plant prior to May 14, 1904, drew certain time drafts payable to his own order and aggregating fifty thousand dollars, which drafts were drawn upon and accepted by I. C. Plant's Sons Bank of Macon, Georgia, and were afterwards endorsed by the said R. H. Plant for value to the Defendant; but Plaintiff avers that when the Defendant received said check from said First National Bank of Macon, Georgia, and credited the amount thereof to the credit of said First National Bank and charged the same amount to said Plant as aforesaid, said Defendant thereafter held the said

*Facts in Stipulation—
Continued.*

"VIII. That under and by virtue of his election and qualification as agent of the First National Bank of Macon, the Plaintiff, A. L. Miller, became vested with the title to and entitled to the possession of all of said insolvent bank's property and effects, and empowered to bring suit for the purpose of obtaining the same and collecting and receipting for the amount of said check."

"IX. That said R. H. Plant, prior to May 14, 1904, and May 16, 1904, drew certain time drafts, payable to his own order, and aggregating fifty thousand (\$50,000.00) dollars, which drafts were drawn upon and accepted by R. H. Plant, doing a banking business under the name of I. C. Plant's Sons Bank of Macon, Georgia, and were afterwards endorsed by the said R. H. Plant, for value, to the defendant, the American National Bank of Nashville, Tennessee.

"None of said drafts were due on May 16, 1904, nor did they become due for some time after May 16, 1904."

*Facts in Declaration—
Continued.*

amount of three thousand dollars, represented by said check, for the use and benefit of said First National Bank of Macon, Georgia, and under an implied promise to said First National Bank of Macon, Georgia, to pay to it the amount of said three thousand dollars on demand."

(7th para. Declaration.)

"It is further averred by Plaintiff that, although due demand for the payment of said sum of three thousand dollars so deposited and held by said Defendant bank, by and for the use of said First National Bank of Macon, Georgia, has been duly made by Plaintiff upon said Defendant bank, said Defendant bank has failed and refused and still fails and refuses to pay said sum or any part thereof to Plaintiff as agent aforesaid."

(8th para. Declaration.)

*Facts in Stipulation—
Continued.*

"X. That the Plaintiff, A. L. Miller, and his predecessors, have made due demand upon the Defendant, the American National Bank of Nashville, for the payment of the sum of three thousand (\$3,000.00) dollars, the amount of said check drawn by R. H. Plant in favor of the First National Bank of Macon, Georgia, which check was received by the Defendant, the American National Bank, and by it duly credited on the 16th day of May, 1904, to the credit of the First National Bank of Macon, Georgia; but said Defendant, the American National Bank of Nashville, failed and refused and still fails and refuses to pay said sum or any part thereof to Plaintiff."

The foregoing comparison sets forth every fact alleged in the declaration, and by an examination of the facts directly opposite thereto it will be seen that every fact therein alleged is agreed by counsel for Plaintiff in error to be true.

It is, therefore, insisted that the Court's finding that the "material facts alleged in the declaration" are true, was amply justified by the evidence, as shown by said comparison.

The third paragraph of said finding is as follows:

"In that view of the case it becomes necessary to find whether the Defendant has made out the defenses set up in its pleas. In reference to those defenses, I find the material facts established by the weight of the evidence to be as follows:

"First, that the day that check was drawn by R. H. Plant, Plant was insolvent, and that he knew his own insolvency; that he was on that date the president of the First National Bank of Macon, Ga., and had been for some time; that R. H. Plant was also on that date indebted to the Defendant, the American National Bank of Nashville, in the sum of fifty thousand dollars on account of his accepted drafts which had been endorsed over to the American National Bank, and were then held by it, so although the said accepted drafts were not then due and did not mature until some time after April 16, 1904; and that R. H. Plant himself knew that the American National Bank on the day the three thousand dollars check was drawn on it on Plant's account, and on May 16, 1904, when it charged that check

to Plant's individual account and credited it to the account of the First National Bank of Macon, Ga., as I find it did, and advised them of that credit by letter of advice, had no knowledge of Plant's insolvency, it didn't know that he was then insolvent or that the petition in bankruptcy had been filed against him."

We admit for the purpose of the questions now being reviewed that every material fact found in the paragraph just quoted is true, and as every fact found therein is in favor of the Plaintiff in error, and averred by it to be true, it is deemed unnecessary to give further consideration thereto.

The fourth paragraph is as follows: (Records 105, 106.)

- (1) ["I further find as a fact, from the proof, that the three thousand dollar check drawn by Plant was taken by the First National Bank of Macon, Ga., as a credit on a balance of a much larger amount that R. H. Plant then owed the First National Bank of Macon, Ga., arising out of the clearing house transactions, and when it had been so taken as a credit, it was forwarded by the First National Bank on
- (2) May 14, 1904, as shown by stipulation of facts;] [that R. H. Plant was a large stockholder and president in the First National Bank and controlled its policy and management, and that it was a general custom in the bank to accept and discount any paper that he might send to them, and to credit upon his account any paper that he might

- send for the purposes of credit, but that paper received for the purpose of credit was generally credited by the bank irrespective of any such custom, under a general habit to credit whatever a man would send for the
- (3) purpose of credit;] [that at the time this three thousand dollar check was drawn, R. H. Plant was not at the bank and had not been there for some five or six weeks, although he had been in frequent, if not daily, communication with the officers of the bank;]
 - (4) [that he gave no specific directions in reference to this particular check to the officers of the First National Bank, who were conducting his affairs during his sickness; at least, there is no evidence that shows that
 - (5) fact by the weight of the evidence;] [that the officers and agents of the First National Bank of Macon, who were conducting its affairs during his sickness, and who received and accepted this three thousand dollar check and forwarded it to the defendant bank, had, when they received and forwarded it, no knowledge of Plant's insolvency, and that they furthermore had no knowledge of the fact that Plant was individually indebted to the American National Bank by reason of his five (the word 'fifty' is written in pencil over the word 'five'—*Clerk*) thousand dollars; they did not know that he was then indebted to the American National Bank in
 - (6) any sum;] [that the private bank of I. C. Plant's Sons, which was really Plant himself, he doing business under that name,

- closed its doors early on the morning of the 16th and was insolvent, and that a petition in bankruptcy was filed against Plant himself after eleven o'clock that morning, and that he was subsequently adjudged a bankrupt.] [That the officers of the First National Bank at Macon, Ga., knew, according to the weight of the proof, that that petition in bankruptcy had been filed, and they knew of the suspension of business of Plant's private
- (7) bank after it occurred;] [that the First National Bank of Macon was also compelled to close its doors something after nine o'clock of the same morning and did close its doors;]
- (8) [that later in the day, some time after the closing of the First National Bank, the American National Bank of Nashville credited the account of the First National Bank of Macon with the amount of his three thousand dollar check and sent a letter of advice to the First National Bank of Macon on the
- (9) night mail;] [that when that credit was entered up, the officers of the American National Bank of Nashville had no knowledge of Plant's insolvency or of any of the matters that had occurred on that day at Macon, Ga., and that the officers of the First National Bank of Macon, who had forwarded the three thousand dollar check on the 14th, did not notify by telegram, the American National Bank of the fact of the filing of the petition in bankruptcy or of the suspension
- (10) of Plant's private bank.] [That, thereafter, on learning these facts, within a few days the
- (11)

- American National Bank changed back its entries on the books and charged off that credit which it had given the First National Bank for the three thousand dollar check and applied the balance, or endeavored to apply by book entries, the amount of the balance standing to Plant's individual account, which was something over three thousand dollars, independent of this check, to
- (12) that \$50,000.00 indebtedness;] [that subsequently, at a precise date not apparent, the First National Bank or its representatives who had title to its claim, whatever its claim might be, made demand on the American National Bank for payment of that three thousand dollars which had been credited to that bank on the 16th, and that the American National Bank refused to pay it. Now, those are the material facts, as I find them.”]

Record, pp. 105, 106.

As the foregoing paragraph is long, and, therefore, necessarily tedious, it has, for convenience, been divided into natural divisions within brackets and each of said divisions numbered consecutively from 1 to 12.

Every material fact included within the *first* set of brackets, as stated by the Court, is contained in the stipulation of agreed facts, in the following language:

“That on May 14, 1904, R. H. Plant *was justly indebted* to the First National Bank of Macon,

Ga., in the sum of three thousand (\$3,000.00) dollars.” (*Italics ours.*)

“That on said 14th day of May, 1904, R. H. Plant drew his check on the Defendant, (in) the said American National Bank of Nashville, Tennessee, made payable to and in favor of the First National Bank of Macon, Georgia, in the sum of \$3,000.00. and delivered said check to said First National Bank of Macon, Georgia, in payment of the aforesaid indebtedness.”

Record, p. 2.

Furthermore, none of these facts have ever been denied by Plaintiff in error, and they certainly cannot be challenged now.

The findings of facts included in the *second* set of brackets cannot be consistently objected to by Plaintiff in Error because they are based solely upon testimony introduced by its counsel, and which was given by witnesses introduced in its behalf. This will be shown by an examination of pages 6 and 24 of the record, where the exact testimony supporting said findings is transcribed. Furthermore, the facts therein found have never been denied, and it is confidently asserted that they never will be.

The finding included within the *third* set of brackets, as follows:

“That at the time this three thousand dollar check was drawn, R. H. Plant was not at the bank and had not been there for some five or six weeks, although he had been in frequent, if not

daily, communication with the officers of the bank,”

was based upon the positive and uncontradicted testimony of Messrs. Findley, Plant and Stallings, each of whom testified unequivocally to said facts.

Record, pp. 84, 91 and 95.

Also, the finding within the *fourth* set of brackets, as follows:

“That he gave no specific directions in reference to this particular check to the officers of the First National Bank, who were conducting his affairs during his sickness, at least, there is no evidence that shows that fact by the weight of the evidence,”

was based upon the positive and uncontradicted testimony of Messrs. Findley and Plant, each of whom testified unequivocally to said facts.

Record, pp. 89, 93.

The finding included within the *fifth* set of brackets, to the effect that none of the officers of the First National Bank who were conducting the affairs at the time the check was accepted and forwarded to the Defendant, knew of Plant's insolvency, nor of Plant's indebtedness to the Defendant in any sum, is unequivocally supported by unanimous and uncontradicted testimony of Messrs. Finley, Plant and Stallings.

Record, pp. 85-86, 92, 93, 97-98.

As to whether the finding enclosed within the *sixth*

set of brackets is supported by the evidence, it is only necessary to cite paragraph VI of the Stipulation of Facts (Record, p. 6), wherein it is admitted that Plant was, as found, bankrupt and insolvent on May 16, 1904, and also to the averments of the third plea of the Defendant (Record, p. 122), where every fact herein found is averred to be true.

The findings in brackets numbered 7 and 8 are, in all material respects, identical with the averment of fact contained in each of the Defendant's three pleas (Record, pp. 119, 121, 122), which is as follows:

“When said charging and crediting of said check by Defendant took place, and when advice of the same was mailed to the First National Bank, the Defendant was entirely ignorant of said Plant's insolvency, and of the suspension of his bank and of the filing of the petition in bankruptcy and of the insolvency of the First National Bank and of its suspension, On the other hand, said First National Bank had knowledge of said suspension and bankruptcy as soon as it took place, and did not notify Defendant of either.”

Record, p. 121.

As these findings were based upon facts averred by the Defendant to be true, it is insisted that Defendant is estopped from denying that they are true.

Every fact found within the *ninth* set of brackets is admitted by Plaintiff in Error in paragraph VI of the Stipulation of Facts (Record, p. 2), to be true, and are, therefore, supported by the best of evidence.

The findings of fact set forth within brackets numbered 10 are in all material respects identical with the averment of facts contained in each of the Defendant's three pleas (Record, pp. 119, 121 and 122), which is as follows:

“When said charging and crediting of said check by Defendant took place, and when advice of the same was mailed to the First National Bank, the Defendant was entirely ignorant of said Plant's insolvency, and of the suspension of his bank and of the filing of the petition in bankruptcy and of the insolvency of the First National Bank and of its suspension. On the other hand, said First National Bank had knowledge of said suspension and bankruptcy as soon as it took place, and did not notify Defendant of either.”

Record, p. 121.

And as these findings were based upon facts averred by the Defendant to be true, it is insisted that Defendant is estopped from denying that they are true.

The facts found within brackets numbered 11 are averred in Defendant's plea (Record, p. 123), as follows:

“Under the laws of the State of Georgia, and also under the laws of the State of Tennessee, Defendant had a lien on said deposit for the indebtedness due it and had the right to set off *pro tanto* the entire amount due from it to said Plant against the fifty thousand dollar indebtedness due it from said Plant, and would have exercised the right to set off had it known of said Plant's

insolvency, suspension or bankruptcy. Defendant supposed him to be entirely solvent and supposed his bank to be still open and transacting business, and it was under such mistake that such charging and crediting of the check took place and advice thereof was sent to the First National Bank. Within a short time after Defendant learned of said Plant's insolvency, suspension and bankruptcy, it charged back to said First National Bank said check for \$3,000 and credited the same to said Plant's account for the purpose of exercising its right of set-off. . . ."

As these findings were also based upon facts averred by the Defendant to be true, it is earnestly insisted that said Defendant is estopped from denying that they are true.

The facts found within brackets numbered 12 are specifically admitted in paragraph I of the Stipulation of Facts (Record, pp. 3 and 4) to be true, and, therefore, cannot be denied.

The two remaining findings of fact, which conclude all of the findings by the Court, to be found at pages 107 and 108 of the Record, were requested by the Defendant, and it cannot now complain with good grace that the Court's findings thereupon were not supported by legitimate evidence.

SUPREME COURT OF THE UNITED STATES.

No. 325.—OCTOBER TERM, 1912.

The American National Bank of Nashville, Tennessee, Plaintiff in Error, <i>vs.</i> A. L. Miller, Agent of the First National Bank of Macon, Georgia.	}	In error to the United States Circuit Court of Appeals for the Sixth Circuit.
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[June 9, 1913.]

Mr. Justice LAMAR delivered the opinion of the Court.

R. H. Plant, of Macon, Georgia, kept a deposit account with the American National Bank of Nashville, and, on May 16, 1904, was indebted to it in the sum of \$50,000 on paper which matured two or three weeks later. He was generally regarded as a wealthy man, but was in fact insolvent. While so insolvent he, on May 13, 1904, gave to the First National Bank of Macon, of which he was President, a check for \$3,000 on account of an indebtedness due by him to it.

The Macon Bank at once mailed the check to the Nashville Bank with instructions to place it to the credit of the Macon Bank. The check was received by the Nashville Bank at 8 o'clock Monday morning, May 16th. The letter was opened shortly after nine o'clock and was credited to the Macon Bank's account about 11 o'clock A. M.—an hour or so after a petition in bankruptcy had been filed against Plant in Macon. His failure precipitated a run on the Macon Bank, and, the same day, by direction of the Comptroller of the Treasury, a Receiver was appointed for it under R. S. § 5234.

The Nashville Bank was not advised of either of these failures, and about 2 o'clock it charged the \$3,000 check to Plant's account and the same day mailed to the Macon Bank a letter stating that its account had been credited with \$3,000. Four or five days later, having learned of Plant's bankruptcy, it charged off the \$3,000, claiming that Plant's insolvency, on May 16th, gave to the Nashville Bank the right of set-off even as against the unmatured drafts. *Carr v. Hamilton*, 129 U. S. 256.

The plaintiff was subsequently appointed Agent of the Macon Bank under Rev. Stat. Sec. 5234, and brought suit against the Nashville Bank for the recovery of the \$3,000. Most of the facts were

agreed upon, but much evidence was taken for the purpose of showing that the Macon Bank had notice of Plant's insolvency, and at the conclusion of the testimony each party moved that a verdict be directed in its favor. *Beutell v. Magone*, 157 U. S. 154. The court instructed the jury to find for the plaintiff. The judgment was affirmed (185 Fed. 338) by the Circuit Court of Appeals.

There are some disadvantages of sending a check for collection directly to the bank on which it is drawn, but when such bank performs the dual function of collecting and crediting the transaction is closed and, in the absence of fraud or mutual mistake, is equivalent to payment in usual course. *National Bank v. Burkhardt*, 100 U. S. 689. In the present case it was as though an officer of the Macon Bank had presented the check to the Teller of the Nashville Bank and on receiving the money had paid it back over the counter for deposit to the credit of the Macon Bank.

The Nashville Bank, however, claims that there was here the element of fraud and mistake which entitles it to cancel the credit; insisting that the Macon Bank, having notice that Plant was insolvent, could not collect the check for \$3,000 without notifying the Nashville Bank of such insolvency so that it might assert its superior right under its banker's lien and set off the \$3,000 deposit against Plant's debt of \$50,000.

The law undoubtedly permits an insolvent to prefer one creditor over another and allows such creditor to retain such preferential payment against all persons,—except the Trustee in Bankruptcy, when the payment has been made within four months of the filing of the petition in bankruptcy and with reasonable cause to believe that a preference would be effected. We do not enter upon the question as to whether this right to be preferred is modified by principles of equity or whether the holder of a check, in presenting it to a bank for payment, is bound to give information that the bank's depositor and debtor was insolvent. For in this case it distinctly appears that the officers of the Macon Bank did not know that Plant was insolvent at the time he gave the check, at the time they mailed the check or at the time it was received by the Nashville Bank, nor did they know that Plant was indebted to the Nashville Bank. Such notice however, is sought to be imputed to the Macon Bank because Plant was its President, and it is argued that what he knew the bank must be considered as knowing.

This presents another phase of the oft-recurring question as to when and how far notice to an agent is notice to his principal. In view of the many decisions on the subject it is unnecessary to do more

than to apply them to the facts of this case. If Plant, within the scope of his office, had knowledge of a fact which it was his duty to declare and not to his interest to conceal, then his knowledge is to be treated as that of the bank. For he is then presumed to have done what he ought to have done and to have actually given the information to his principal.

But if the fact of his own insolvency and of his personal indebtedness to the Nashville Bank were matters which it was to his interest to conceal, the law does not by a fiction charge the Macon Bank, of which he was President, with notice of facts which the agent not only did not disclose, but which he was interested in concealing.

Plant was a private banker in Macon and as such indebted to the First National Bank of Macon, of which he was President and so far dominated as to compel it to take care of the large balances against him in the clearing house, frequently more than 50 per cent. of the \$200,000 capital of the Macon Bank. On May 13th Plant was indebted to the Macon Bank on this account between \$75,000 and \$100,000. A National Bank Examiner was in the city and it was expected that he would examine the books of the Macon Bank within a few days, when this illegal overdraft by the President would appear. Rev. Stat. § 5200; *Evans v. U. S.*, 153 U. S. 584. Plant thereupon gave the Bank checks and commercial paper to pay the balance. It was to his personal interest to conceal any fact which would prevent the Macon Bank from receiving paper in satisfaction of a debt which had been unlawfully contracted by reason of his official position. An element of that interest was that he should conceal not only the fact of his insolvency but the fact of his indebtedness to the Nashville Bank, lest the Macon Bank should thereby refuse to take the \$3,000 check at its face value. Without, therefore, inquiring as to what would have been the duty of the Macon Bank had it known of Plant's insolvency and indebtedness on the \$50,000 drafts, we hold that as it had no such knowledge in fact it was not charged with such knowledge in law. The judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.